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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1021

GRANVILLE CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION, WILLIAM E. BUTLER, DON L. MILLER, FREDERICK J. REED, BEVERLY TATKO, ROBERT L. FLOWER, TERRY M. KNIPES, WALTER PERRY III, FRANK P. VILLANO, DONALD BINCK, MARIE VANDERMINDEN, and THERESA McCAULIFFE, each individually and in their official capacities,

Petitioners,

against

DONNA THOMAS, JOHN TIEDEMAN, by and through his parents MR. & MRS. HENRY TIEDEMAN, DAVID JONES, by and through his parents MR. & MRS. JOHN E. JONES, RICHARD WILLIAMS, by and through his parents MR. & MRS. ARTHUR F. WILLIAMS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In the

Supreme Court of the United States

October Term, 1979.

No. .

Granville Central School District, Board of Education, William E. Butler, Don L. Miller, Frederick J. Reed, Beverly Tatko, Robert L. Flower, Terry M. Knipes, Walter Perry III, Frank P. Villano, Donald Binck, Marie Vanderminden, and Theresa McCauliffe, each individually and in their official capacities,

Petitioners,

against

Donna Thomas, John Tiedeman, by and through his parents Mr. and Mrs. Henry Tiedeman, David Jones, by and through his parents Mr. and Mrs. John E. Jones, Richard Williams, by and through his parents Mr. and Mrs. Arthur F. Williams,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit on its judgment entered in this case.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not yet reported (A1). The opinion of the Court of Appeals for the Second Circuit denying petitioners' petition for reargument is not yet reported (A35). The opinion of the Court of Appeals for the Second Circuit denying petitioners' petition for a rehearing *en banc* is not yet reported (A33). The opinion of the District Court for the Northern District of New York denying temporary injunctive relief is not yet reported (A37). The opinion of the District Court for the Northern District of New York denying permanent injunctive relief is not yet reported (A59).

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was dated and entered on October 15, 1979. The judgments for the Court of Appeals for the Second Circuit refusing to rehear this matter *en banc* and denying rehearing were dated and entered on November 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review.

1. Did the Circuit Court err when it held that a public school must make its public facilities available for the publication and storage of an arguably obscene or indecent underground newspaper?

2. Did the Circuit Court err when it held that a public school cannot punish students for activities occurring within the school building if those activities result in the sale of a newspaper outside of the school building?

3. Did the Circuit Court err when it held that the rule in *Tinker v. Des Moines,* 393 U.S. 503 (1969), requires proof of *actual disruption* of the educational process even in cases where the speech in question is indecent?

4. Did the Circuit Court err when it held that, in cases involving expression, "no prior restraint can be enforced and no subsequent punishment can be inflicted absent the considered approbation of an independent adjudicator?"

5. Did the Circuit Court err when it held that the school principal was bound by the written reasons for the discipline provided to the students even though the District Court found that the principal had other valid reasons for the discipline which he failed to set forth in the writing?

6. Did the Circuit Court err when it found facts in sharp contrast to the undisputed facts presented to the District Court and when it failed to decide the primary issue in dispute between the litigants?

Constitutional Provisions, Statutes and Regulations.

UNITED STATES CONSTITUTION

FIRST AMENDMENT:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT

Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 UNITED STATES CODE §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

NEW YORK STATE CONSTITUTION

ARTICLE VIII SECTION 1:

> "No . . . school district shall give or loan any money or property to or in aid of any individual . . ."

NEW YORK EDUCATION LAW

SECTION 3214(3) (a) (1):

> "3. Suspension of a Pupil. a. The Board of Education, The Board of Trustees or sole trustee, the Superintendent of Schools or District Superintendent of Schools may suspend the following pupils from required attendance upon instruction: (1) A pupil who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others."

NEW YORK PENAL LAW

SECTION 235.20 DISSEMINATING INDECENT MATERIAL TO MINORS; DEFINITIONS OF TERMS:

> "6. 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors."

GRANVILLE SCHOOL POLICY NO. 5114:

SHORT TERM SUSPENSION (suspension of up to five [5] days)

> "In the Granville Central School District the building principal is authorized to suspend students for up to five days for serious infractions and violations of school regulations and/or for serious misbehavior where other penalties are less appropriate. The law in New York State specifies that a student may be suspended temporarily who is 'insubordinate or disorderly, or whose conduct otherwise (or whose physical or mental condition) endangers the safety, morals, health or welfare of others.'"

Statement of the Case.

This case involves the writing, editing, publication, distribution and sale of an underground newspaper by four students at Granville Junior-Senior High School in upstate New York. The students were suspended for five days by the school and subsequently brought suit in U. S. District Court under 42 U.S.C. §1983 for alleged First Amendment violations.

The District Court, Foley, J., found that a substantial portion of the relevant activities occurred on school property. The District Court held that the suspension of the students by the school was warranted because the students were insubordinate in their unauthorized use of public property after a warning, and on the basis that the school authorities could reasonably forecast substantial disruption of the education process. The issue of whether the publication was obscene as to the eleven hundred students in the school aged 11 through 18 was not decided (see Editorial Page attached hereto at A63).

The Second Circuit (Kaufman, Ch. J.) reversed the decision of the District Court and remanded for a determination of appropriate relief. The Circuit Court found that the activity of the students occurred essentially outside the school property and that, as a result, the school had no authority to punish such activity.

The students had argued in the District Court, and on appeal to the Circuit Court, that they had the right to publish and sell their underground newspaper in the school building without interference. This question, which was at the heart of the controversy, was not reached by the majority of the Circuit Court but received a thoughtful analysis in the concurring opinion of Judge Newman.

Reasons why a Writ of Certiorari Should be Granted.

I.

The decision of the Circuit Court has decided important new questions of Federal Constitutional Law which have not been, but should be, settled by this Court.

The Circuit Court decision in this case received extensive coverage in all the media. The New York Times carried reports of the case on October 16, 1979 (p. B4) and October 21, 1979 (News of the Week in Review).

In those articles various civil rights experts characterized the Circuit Court decision as "the first clearly to affirm the First Amendment rights of students off campus" and "a sweeping affirmation of the First Amendment rights of high school students in their nonscholastic lives, and as such, a major statement about the right of freedom

of expression." Despite these proclamations, the scope of the Circuit Court decision is unclear. The Circuit Court purported to establish several new and significant rules of Constitutional law.

In the instant case the students were told by the school administrator not to use the public facilities of the school to produce a newspaper. They ignored the warning and edited, typed and stored the papers in the school building.

The District Court found this activity to be punishable insubordination. The Circuit Court made new law when it held that the Constitution bars such punishment because the students intended to sell the paper outside the school and because sales were made outside the school. This Court should review this legal innovation.

Chief Circuit Judge Kaufman also held at page 93 of the Court's decision:

> "In the community-at-large, therefore, the First Amendment dictates that, in cases involving expression, no prior restraint be enforced and no subsequent punishment be inflicted absent the considered approbation of an independent adjudicator, cf. Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681, 681-83 (1979)."

Judge Kaufman expressed his concern about the inability of school children to obtain a meaningful and timely judicial determination if they are suspended from school for only a few days. Under the new Second Circuit rule, however, school administrators would have to apply to Federal Court before they could suspend a child for a few days. In the Northern District of New York *three* Federal judges serve more than *thirty counties.* This new rule will be burdensome to the judges, to the schools and to the children.

This novel legal concept should be reviewed by the Supreme Court.

The Circuit Court held that the school authorities were bound by the reasons set forth in "an official suspension letter" (A64) handed to the students by the school principal (see Circuit Court opinion ftnt. 12). After hearing the testimony of the school administrators the District Court had found that other valid reasons for the suspensions existed and, although omitted from the suspension letter, they could be used as a basis for disciplining these high school children.

The Circuit Court has, therefore, added procedural requirements to the discipline of school children which were not considered by this Court in *Goss v. Lopez,* 419 U.S. 565 (1975), nor in any other decision of this Court.

This new legal concept should be reviewed by the Court.

II.

The decision of the Circuit Court in this matter is in conflict with Article VIII, Section 1, of the Constitution of the State of New York and with the decisions of the New York State Court of Appeals construing that article.

Article VIII, Section 1, of the New York State Constitution prohibits the use of public property for private profit. This State Constitutional concept that property held for public use cannot be devoted to private profit was affirmed by the New York State Court of Appeals as early as 1910 in *Swan v. Doxee, et al.,* 136 App. Div. 400,

198 N.Y. 605, where the Court affirmed a lower Court order to remove a private icehouse from a public dock.

This concept was reaffirmed by that Court in *Lake George Steamboat Co., Inc., v. Blais,* 30 N.Y. 2d 48 (1972), where the Court held that public docks could not be leased to private sightseeing vessels.

The Circuit Court decision in this case holds that public school administrators must permit public school property and facilities to be used to produce, edit, type and store a newspaper if the intent is to sell the paper in the community-at-large. The rule applies at least in those cases where the in-school activities are *de minimis.*

The apparent conflict between the New York State Constitution and the United States Constitution should be resolved by the Supreme Court

III.

In this case the Circuit Court has decided Federal questions in a way which conflicts with applicable decisions of this Court and which confuses the standards laid out by this Court in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

The conflict in the circuits over the rule in *Tinker* is aptly stated in *Fujishima v. Board of Education,* 460 F. 2d 1355 (7th Cir. 1972), at pages 1358-59. There the Seventh Circuit disagreed with the Second Circuit application of *Tinker* to a prior restraint case calling it "unsound constitutional law." By holding that the rule in

Tinker is applicable only in post-publication punishment cases the Seventh Circuit would require school officials to wait until the damage is done before they can act.

In the instant case the District Court found that the *Tinker* "forecast" rule was satisfied when seven professional educators opined that there were facts in existence which would lead the school authorities to forecast substantial disruption of, or material interference with, school activities. The District Court also found such material interference. The school authorities did not wait for actual substantial disruption of their school.

The Circuit Court opinion of Judge Kaufman found that "These predictions are convincingly repudiated by uncontradicted evidence that (the school) continued to operate normally . . .". The majority opinion appears to require proof of *actual disruption* of the educational process before school authorities can take any punitive steps.

Finally, Judge Newman's concurring opinion finds that where a publication is indecent—as opposed obscene—*Tinker* does not impose the "substantial disruption" test at all.

The majority of the Circuit Court found the school administrators' treatment of the Constitutional issues in this case to be "unsophisticated." See Circuit Court Opinion ftnt. 14. The Constitutional rules which relate to education should be comprehensible by those who operate our schools. It should not be necessary for a school administrator to seek declaratory judgment in Federal

Court and face the possibility of appeal before he can impose a five-day suspension upon a fifteen-year-old junior high school student.

The confusion over the rule in *Tinker* illustrated in this Second Circuit decision and in the Seventh Circuit decision in *Fujishima, supra,* should be eliminated by a decision of this Court.

IV.

By altering undisputed facts and by failing to decide the primary issue in dispute the Circuit Court has so far departed from the accepted and usual course of judicial review as to call for an exercise of this Court's power of supervision.

The students never argued either in the District Court nor on appeal to the Circuit Court that their use of public school property and facilities in the production of their paper was "scant" or *"de minimis."* See Table of Contents from student-appellants' brief in Circuit Court (A67).

Substantial in-school activity was undisputed. Student-appellants' brief to the Circuit Court concedes that the paper was written in the school, edited in the school, marketed in the school and ". . . with Mr. Mager's permission, stored in his closet during the day (TR. 35-36, 70, 76; JA. 70, 114, 117)." The District Court also found evidence in the record that the paper may have been sold in the school.

The entire basis for the Circuit Court decision rests upon its fact finding that "Apart from these scant and insignificant contacts, however, they worked exclusively in their homes, off campus and after school hours." This finding, totally without foundation in the record, is in sharp contrast to the facts admitted by the students themselves during the trial and on appeal.

The Circuit Court cites no basis in the record for reversing all of the fact findings of the District Court nor does it state that the District Court erred in its factual findings.

By this drastic alteration of the undisputed facts the Circuit Court has so far departed from the usual course of judicial review as to call for an exercise of this Court's power of supervision.

The Circuit Court majority actually failed to decide the basic dispute between the parties. The primary dispute was whether school authorities could prohibit future sales of the newspaper *on school grounds.*

The fact that this was the primary dispute between the parties is clear from the Table of Contents to the student-appellants' brief on appeal (A67).

At the conclusion of the trial in the District Court the school district offered to expunge all reference to the suspensions if the students would only promise no further distribution of the paper *on school grounds.* This offer of settlement was made on the record. The offer was rejected by the students on the record because they claim the right to distribute the paper *on school grounds* and they have never abandoned that claim.

The majority of the Circuit Court finds that the students abandoned the claim of further distribution on school grounds. The finding is erroneous and without foundation. Judge Newman, in footnote 3 of his concurring opinion, cites the various sections of the student-appellants' brief which claims a right to on-campus distribution.

By failing to decide the primary dispute between the parties, which dispute was decided by the District Court, the Circuit Court has so far departed from the accepted and usual course of judicial review, as to call for an exercise of this Court's power of supervision.

Conclusion.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Decision of Second Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 142—September Term, 1979.

(Argued September 6, 1979

Decided October 15, 1979.)

Docket No. 79-7382

DONNA THOMAS; JOHN TIEDEMAN, by and through his parents Mr. and Mrs. Henry Tiedeman; DAVID JONES, by and through his parents Mr. and Mrs. John E. Jones; RICHARD WILLIAMS, by and through his parents Mr. and Mrs. Arthur F. Williams,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION, GRANVILLE CENTRAL SCHOOL DISTRICT; WILLIAM E. BUTLER; DON L. MILLER; FREDERICK J. REED; BEVERLY TATKO; ROBERT L. FLOWER; TERRY M. KNIPES; WALTER PERRY, III; FRANK P. VILLANO; DONALD BINCK; MARIE VANDERMINDEN; and THERESA MCCAULIFFE; each individually and in their official capacities,

Defendants-Appellees.

Before:

Kaufman, Chief Judge,
Newman and Kearse, Circuit Judges.

Appeal from orders entered in the United States District Court for the Northern District of New York, James T. Foley, Chief Judge, denying preliminary and permanent injunctive relief under 42 U.S.C. §1983 for alleged First Amendment violations.

Reversed and Remanded.

Richard Emery, Esq., New York, New York (New York Civil Liberties Union), for Plaintiffs-Appellants.

H. Wayne Judge, Esq., Glens Falls, New York (Caffrey, Pontiff, Stewart, Rhodes & Judge), for Defendants-Appellees.

KAUFMAN, Chief Judge:

Public education in America enables our nation's youth to become responsible participants in a self-governing society. To perform this critical function effectively, professional educators must be accorded substantial discretion to oversee properly their myriad responsibilities. But our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government. Where, as in the instant case, school officials bring their punitive power to bear on the publication and distribution of a newspaper off the school grounds, that power

must be cabined within the rigorous confines of the First Amendment, the ultimate safeguard of popular democracy. We hold that these limits have been exceeded in the case before us.

I

Granville is a small, rural community located some sixty miles north of Albany, in upstate New York. In this quiet town, Donna Thomas, John Tiedeman, David Jones, and Richard Williams, all students in the Granville Junior-Senior High School,[1] conceived a plan in November 1978 to produce a satirical publication addressed to the school community. As their project evolved in succeeding months, the students decided to emulate *National Lampoon,* a well-known publication specializing in sexual satire. After soliciting topics from their fellow students, the editors drafted articles pasquinading school lunches, cheerleaders, classmates, and teachers. Articles on masturbation and prostitution as well as puzzles and a cartoon were also prepared. Some of the initial preparation for publication occurred after school hours in the classroom of a Granville teacher, George Mager. Intermittently, the students conferred with Mager for advice on isolated questions of grammar and content. At most, it appears that only an occasional article was composed or typed within the school building, always after classes. Apart from these scant and insignificant school contacts, however, they worked exclusively in their homes, off campus and after school hours.

In mid-January, Mager first noticed a draft of an article in the students' papers and immediately informed

[1]Approximately 1100 children attend Granville Junior-Senior High School, ranging in age from eleven to eighteen, in grades seven through twelve. The four appellants were all Senior High School students.

Granville's Assistant Principal, Frederick Reed, of his discovery. Shortly thereafter, Reed summoned Tiedeman and discussed with him the "dangers" of publishing material that might offend or hurt others. Specifically, he told Tiedeman that a similar publication several years before had culminated in the suspension of the students involved. Accordingly, Reed cautioned Tiedeman to refrain from mentioning particular students and to keep the publication off school grounds.

In response to Reed's admonition, Tiedeman and his young associates deleted several proposed articles and excised students' names from others. Moreover, they assiduously endeavored to sever all connections between their publication and the school. A legend disclaiming responsibility for any copies found on school property was affixed to the newspaper's cover. Indeed, all 100 copies of the paper were produced by the facilities of a community business. Once completed, the publication was stored, with Mager's permission, in his classroom closet. At the end of each school day, the students retrieved a number of copies and sold each one for twenty-five cents to classmates[2] at Stewart's, a store in Granville. Within a week, all but seven copies were sold, and receipts totalled $11 to $13.

The publication, entitled *Hard Times*,[3] first surfaced

[2]The editors sold their paper to older classmates, refusing to dispense *Hard Times* to junior high school students. Indeed, Judge Foley subsequently found there was no evidence that seventh and eighth graders ever secured copies of the newspaper.

[3]The paper's contents are aptly described by the banner across its cover as "uncensored, vulgar, immoral." Its thirteen pages are saturated with distasteful sexual satire, including an editorial on masturbation and articles alluding to prostitution, sodomy, and castration.

within the school on January 24 when a teacher confiscated a copy from a student and presented it to Granville's principal, William Butler. Butler and Don Miller, Superintendent of Schools, initially agreed to take no action, at least until they could assess the publication's impact. On January 24 and 25, schoolwide examinations were conducted without incident, demonstrating the soundness of their initial decision. Subsequently, however, Beverly Tatko, President of the Granville Board of Education, learned of the paper's existence through her son, Peter. Shocked and offended, Tatko met with Miller and Butler on January 29 to ascertain how the school officials intended to proceed. Moreover, Tatko intimated her dissatisfaction with the administrators' inaction, and suggested convening a school board meeting to discuss the episode. Immediately Butler instituted an investigation. Mager, surrendering the seven remaining copies deposited for storage in his closet, informed Butler of his limited role in the paper's composition. Moreover, the principal determined that the four appellants were primarily responsible for publication and dissemination of the paper. Miller then telephoned each of the students' parents and invited them to attend a school board meeting that evening.

At the meeting, Butler summarized the results of his investigation and distributed copies of the publication. Later, Miller and Butler, following consultation with the Board of Education, decided to impose a number of penalties: (1) five-day suspensions to be reduced to three days if the student prepared an essay on "the potential harm to people caused by the publication of irresponsible and/or obscene writing"; (2) segregation from other students during study hall periods, throughout the month of February and possibly longer if an acceptable essay were not submitted; (3) loss of all student privileges during the period of suspension; and (4) inclusion of

suspension letters in the students' school files. These sanctions took effect on February 1, when Butler personally informed each student of the punishment and then telephoned their parents to explain the decision. At the same time, he prepared a letter to the parents describing *Hard Times* as "morally offensive, indecedent, and obscene," and outlining the penalties imposed.

On February 6, the students brought this suit under 42 U.S.C. §1983 in the Northern District of New York seeking injunctive and declaratory relief from alleged deprivations of their First and Fourteenth Amendment rights. The Granville Board of Education, Butler, Miller, Reed, Tatko, and the other individual board members were named as defendants. That very day, Judge Foley heard oral argument on the plaintiffs' application for an order temporarily restraining all punishment. The able district court judge enjoined the essay requirement,[4] but otherwise denied the requested relief pending a hearing on the students' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65. Thus, the students had served their full five-day suspensions before Judge Foley heard argument on their request for preliminary injunctive relief. When the hearing finally was held on February 21,[5] the parties called twelve witnesses to explain the events relating to the students' suspensions. In addition, both sides submitted affidavits to assist the court in gauging the paper's likely impact upon Granville's students. Defendants' experts, three school administrators from neighboring towns, predicted in their affidavits a

[4]In granting injunctive relief from the essay requirement, Judge Foley noted that the Supreme Court itself has experienced much difficulty in writing on the question of "irresponsible and/or obscene" expression.

[5]One day before the hearing, plaintiffs filed an amended complaint in which they abandoned their procedural due process claims.

"devastating" effect on public education, whereas plaintiffs' expert, an education professor, asserted in his affidavit that "no competent school administrator" would claim that *Hard Times* would disrupt the educational process of high school students.

Judge Foley denied plaintiffs' motion on May 2, ruling there had been an insufficient showing of likely success on the merits to warrant a preliminary injunction. In support of this conclusion, he noted that Beverly Tatko's professed "shock" at the paper's contents, together with *post hoc* forecasts of possible disruption in the affidavits of defendants' experts, satisfied him that *Hard Times* was potentially destructive of discipline in Granville Junior-Senior High School, and therefore not protected by the First Amendment.[6] Although no school rule specifically governed student publications, the district court judge held that the plaintiffs' activities fell within the scope of a school regulation adopted pursuant to New York Education Law §3214-3(1), authorizing suspension of students who are "insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others."

The district court later consolidated the proceedings on the merits, and denied the plaintiffs' request for a permanent injunction. The plaintiffs have filed timely

[6]Judge Foley also found that some of the composition and ultimately storage of the newspaper had occurred in school, and that there was "some evidence some issues may have been sold" on school grounds. ***But see*** note 12 ***infra***.

appeals from the orders denying both temporary and permanent relief.[7]

II

The proper resolution of this appeal requires us to measure the sanctions imposed by Granville school officials against the yardstick of our constitutional commitment to robust expression pursuant to the First Amendment. It is appropriate, therefore, to review the fundamental principles that buttress our deeply held preference for free discourse over enforced silence, fully mindful of Judge Newman's concurring opinion.

A.

At the heart of the First Amendment is the ineluctable relationship between the free flow of information and a self-governing people, and courts have not hesitated to remove the occasional boulders that obstruct this flow.

[7]On May 21, plaintiffs moved the district court for a final injunction or, in the alternative, consolidation on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Thereafter, plaintiffs filed a notice of appeal pursuant to Fed. R. App. P. 3(a). Although uncertain whether the notice of appeal worked to divest him of jurisdiction to entertain the May 21 motion, Judge Foley ordered the proceedings consolidated on the merits and denied plaintiffs' motion for a permanent injunction.

Although filing of a timely notice of appeal in the district court normally divests that court of further jurisdiction, an appeal from an interlocutory order granting or denying preliminary injunctive relief does not strip the district court of jurisdiction to proceed with the action on the merits. *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906); 9 Moore's Federal Practice ¶ 203.11 (2d ed. 1975). Accordingly, the district court retained jurisdiction to deny the permanent injunction following plaintiffs' May 23 notice of appeal. We shall thus treat the appeal as one from the denial of a permanent injunction.

See, e.g., Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); *Edwards v. National Audubon Society, Inc.,* 556 F.2d 113, 115 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977); Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 193-94. Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking if all ideas, discoveries, and points of view are before the citizenry for its consideration. *See, e.g., Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *United States v. Associated Press,* 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd,* 326 U.S. 1 (1945). Accordingly, we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections.

At the same time, we have frankly recognized that not all expression enlightens the body politic, and that some words are capable of perpetrating grievous harm. Thus, when experience has clearly revealed that the value of a species of expression is thoroughly exiguous, but its potential for harm is great, courts have defined narrow categories of words that the state may punish. *See, e.g., Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974). In this manner, we have excluded libel, obscenity, and incitement from the First Amendment's protective cloak. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Miller v. California,* 413 U.S. 15 (1973); *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

In defining these limited enclaves of unprotected speech, however, we have taken great pains to preserve ample breathing space in which expression may flourish. *See New York Times Co. v. Sullivan, supra,* 376 U.S. at 271-72 (citing *NAACP v. Button,* 371 U.S. 415, 433 (1963)).

Indeed, we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone. To avoid the chilling effect that inexorably produces a silence born of fear, we have been intentionally frugal in exposing expression to government regulation.

Moreover, the subtle calculus we employ to weigh the quantum of chilling effect a free people can tolerate rests upon a fundamental axiom—speech may not be suppressed nor any speaker punished unless the final determination that specific words are unprotected is made by an impartial, independent decision-maker. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561 (1975); *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1953). We recognize the realities of life. Thus, when those charged with evaluating expression have a vested interest in its regulation, the temptation to expand the otherwise precise and narrow boundaries of punishable speech may prove irresistible. Further, a cautious expositor of controversy may well choose silence over expression if he knows that his words will be judged by a decisionmaker predisposed to rule against him. Accordingly, the caselaw explicating the limits of governmental authority over expression counsels, both implicitly and explicitly, that the constitutional status of speech be determined by the judiciary, the one institution of government intentionally designed to render dispassionate justice. *See, e.g., Southeastern Promotions, Ltd., supra,* 420 U.S. at 560-62; *Freedman, supra,* 380 U.S. at 57-60; *Bantam Books, Inc., supra,* 372 U.S. at 68-70. *See generally,* Monaghan, *First Amendment "Due Process,"*

83 Harv. L. Rev. 518 (1970).[8] In the community-at-large, therefore, the First Amendment dictates that, in cases involving expression, no prior restraint be enforced and no subsequent punishment be inflicted absent the considered approbation of an independent adjudicator. *Cf. Kaufman, Chilling Judicial Independence,* 88 Yale L.J. 681, 681-83 (1979).

B.

These principles presuppose a democratic and free society. Yet we recognize that granting the fullest measure of individual freedom in every corner of the polity would, in certain settings, necessarily obstruct fulfillment of vital social functions. Accordingly, although soldiers and prisoners, for example, enjoy many First Amendment privileges, it is beyond cavil that their rights of expression may be curtailed in a manner that would be intolerable in the outside community. *See, e.g., Parker v. Levy,* 417 U.S. 733 (1974); *Pell v. Procunier,* 417 U.S. 817 (1974).[9] Yet, even in these isolated archipelagos, the Constitution requires government authorities to permit the maximum degree of unrestrained expression consistent with the maintenance of institutional integrity. Moreover, since First Amendment freedoms beyond these institutions are

[8]We recognize, of course, that these cases arose in the context of prior restraints on expression. Nevertheless the principles they expound also illuminate the resolution of cases involving subsequent punishment. This is all the more true in informal administrative settings such as we are faced with here. *See* Part III *infra.*

[9]Where practicable, courts have required the state to make clear the classes and methods of expression which it deems irreconcilable with a specific institutional setting. *See Cohen v. California,* 403 U.S. 15, 19 (1971). *But see Parker v. Levy,* 417 U.S. 733 (1974); note 13 *infra.*

jealously guarded, the more stringent restrictions acceptable within them will in no wise inhibit expression in the larger community.

Nowhere is this delicate accommodation more vital than in our nation's schools. Obviously, education would be impossible if teachers were forbidden to sanction incorrect responses or substandard essays with failing grades. Realistically, our children could not be educated if school officials supervising pre-college students were without power to punish one who spoke out of turn in class or who disrupted the quiet of the library or study hall.

These cases, therefore, are not easy of solution and much depends on the specific facts before us. For example, we have consistently maintained that students and teachers enjoy significant First Amendment rights even within the school itself. Thus, in *West Virginia State Board of Education v. Barnett,* 319 U.S. 624 (1943), the Supreme Court held that a student could not be forced to salute the American flag against his will. Moreover, in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the Court ruled that the First Amendment rights of students were abridged when school officials punished them for wearing black armbands in symbolic protest of the Vietnam War. And in a subsequent armband case, *James v. Board of Education,* 461 F.2d 566 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972), we applied *Tinker* to invalidate the discharge of a public school teacher.

But even the *Tinker* line of cases recognizes that expression in school may be curtailed if it threatens to "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker, supra,* 393 U.S. at 509. Moreover, school officials must have some latitude within the school in punishing and prohibiting ordinarily protected speech both out of

regard for fellow students who constitute a captive audience, and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression. Thus, in *Trachtman v. Anker,* 563 F.2d 512, 516 (2d Cir. 1977), *cert. denied,* 435 U.S. 925 (1978), we upheld the action of high school officials who refused to permit distribution of a sexually explicit questionnaire within the school.[10]

Perhaps the most useful illustration of the delicate balance we have endeavored to strike between institutional needs and individual rights is our decision on *Eisner v. Stamford Board of Education,* 440 F.2d 803 (2d Cir. 1971). There we confronted a school board policy that prohibited the distribution of "any printed or written matter" within the school without the prior approval of school administrators. *Id.* at 805. In the adult world, of course, this policy would have succumbed to our heavy presumption against prior restraints. See *Near v. Minnesota,* 283 U.S. 697 (1931); *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971). Yet, because we recognized the unique requirements of the educational process, we declined to hold that a system of prior restraint is presumptively unconstitutional. *Eisner, supra,* 440 F.2d at 805. Rather, we interpreted the First Amendment to require that the review process function expeditiously, ensuring that students could swiftly challenge in a judicial forum an adverse admin-

[10]We have also recognized that school officials can, consistent with the First Amendment, select volumes for inclusion in the school library. *See Presidents Council v. Community School Board,* 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). Thus, in at least some circumstances, school officials can, in accord with the Constitution deem specific publications unsuitable, a power obviously denied to most public officials. *See id.* at 292.

istrative decision. *Id.* [11] Thus, we accommodated our concern for the First Amendment rights of students with a cautious deference to the expertise of educational officials within the academic environment.

III

The case before us, however, arises in a factual context distinct from that envisioned in *Tinker* and its progeny. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate. Indeed, the appellants diligently labored to ensure that *Hard Times* was printed outside the school, and that no copies were sold on school grounds. That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the fact that *Hard Times* was conceived, executed, and distributed outside the school. At best, therefore, any activity within the school itself was *de minimis*.[12]

[11]Because we feared the substantial intrusion into the educational process that would accompany a requirement that school officials seek judicial review before prohibiting distribution of a student publication, *see Eisner, supra,* 440 F.2d at 810, we implicitly relied on the students themselves to challenge an unconstitutional restraint in court. Indeed, student actions under 42 U.S.C. §1983 have become a potent vehicle for the vindication of First Amendment rights within the school. *See, e.g., Papish v. Board of Curators,* 410 U.S. 667 (1973); *Tinker, supra.* We have not, however, been content to compel citizens in the general community to suffer punishment prior to judicial review of its propriety. *See* Part IIA *supra.*

Thus, the limited abrogation of First Amendment guarantees appropriate in *Trachtman* and *Eisner* is wholly out of place here for in those cases all activities were conducted on school property. Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena. Thus, wholly apart from the ultimate constitutional status of the words employed, these punishments could only have been decreed and implemented by an independent, impartial decisionmaker. Because the appellees do not satisfy this standard, we find that the

[12]It may be suggested that appellants' sparse on-campus conduct constituted insubordination, a basis for discipline wholly independent of the students' off-campus expression. *See N.Y. Educ. Law* §3214-3(1). Indeed, we note that Judge Foley concluded that the students' conduct could be punished as insubordination. The official suspension letter sent to the students' parents, however, clearly indicated that appellants' suspensions were premised upon their publication of an allegedly "morally offensive, indecent, and obscene" tabloid, not acts of insubordination. Where First Amendment rights are involved, we are obliged to make an independent and careful examination of the record before us. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964).

Moreover, we recognize, as does Judge Newman, that throughout the judicial proceedings in this case, appellees have consistently disclaimed any desire to punish students for off-campus expression. Nevertheless, by premising the imposition of discipline on their evaluation of the content of an off-campus publication rather than on in-school conduct, appellees have, perhaps inadvertently, overstepped the boundary line they claim to have created.

punishments imposed here cannot withstand the proscription of the First Amendment.[13]

We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice. Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials. *Cf. Eisner, supra,* 440 F.2d at 808.

In the last analysis, a school official acts as both prosecutor and judge when he moves against student expression. His intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy. Accordingly, "under the guise of beneficient concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail." *James, supra,* 461 F.2d at

[13]Our ground for decision makes it unnecessary to address appellants' assertion that school officials are powerless to inflict punishment unless they promulgate detailed regulations governing student expression. *See Shanley v. Northeast Independent School District,* 462 F.2d 960, 976-77 (5th Cir. 1972). We declined a similar invitation in *Eisner, supra,* 440 F.2d at 804-06. Indeed, it is arguable that, as a practical matter, expression is more likely to be inhibited than encouraged if courts were to require schools to adopt regulations limiting speech. Moreover, such a requirement might unnecessarily contravene our oft-articulated deference to the discretion of school officials. *See Tinker, supra,* 393 U.S. at 507; *James, supra,* 461 F.2d at 568.

We also need not determine whether *Hard Times* is obscene. Judge Foley did not reach this claim below, but appellees reiterated at oral argument that they have not abandoned it. Nevertheless, because we hold that school officials are powerless to impose sanctions for expression beyond school property in this case, we are spared the task of venturing into the pornography thicket. Accordingly, we need not examine the content of the publication before us.

575; *accord, Shanley v. Northeast Independent School District,* 462 F.2d 960, 966 (5th Cir. 1972). We note, in this connection, that Granville school administrators failed to discipline the appellants until urged to do so by a community leader, Board of Education president Tatko. Although we are resigned to condone an added increment of chilling effect when school officials punish strictly limited categories of speech within the school, we reject the imposition of such sanctions for off-campus expression.

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon,* the inspiration for *Hard Times,* at a neighborhood newsstand and lends it to a school friend.[14] And, it is conceivable that school officials could consign a student to segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *parens patriae.*[15]

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally un-

[14]There is evidence in the record that Stewart's, the local store at which *Hard Times* was distributed, also regularly sold *National Lampoon* to Granville students.

[15]In fact, contemporary scholarship has been severely critical of excessive state involvement in essentially family affairs as a matter of public policy. *See e.g.,* Institute of Judicial Administration—American Bar Association, *Juvenile Justice Standards Project, Standards Relating to Non-criminal Misbehavior* 12 (Tent. Draft 1977).

versed in difficult constitutional concepts such as libel and obscenity.[16] Since superintendents and principals may act "arbitrarily, erratically, or unfairly," *Eisner, supra,* 440 F.2d at 809, the chill on expression is greatly exacerbated. Indeed, while Granville officials staunchly maintained that *Hard Times* is obscene, there is no evidence they ever consulted the constitutional standard embodied in *Miller v. California,* 413 U.S. 15 (1973), and *Ginsberg v. New York,* 390 U.S. 629 (1968), before suspending the appellants.

Moreover, we cannot overlook the fact that the short duration of most sanctions imposed by school officials—*e.g.,* a five-day suspension—insulates the entire process from effective review. *See Southeastern Promotions, Ltd., supra,* 420 U.S. at 562; *Freedman, supra,* 380 U.S. at 57. Where, as here, the punishment is virtually terminated before judicial review can be obtained, many students will be content to suffer in silence, a silence that may stifle future expression as well. Further, although students must absorb considerable expense to challenge a suspension in court, school officials can mete out punishment without incurring the costs of procedural safeguards a conventional prosecution would require. *See Bantam Books, Inc., supra,* 372 U.S. at 70; Monaghan, *supra,* at 543. Accordingly, students are not only less likely to challenge a punishment, but the state—in the person of school officials—can more easily "prosecute" than if they proceeded through the judicial process. The chilling effect, therefore, is intensified because the promise of judicial review is virtually an empty one.

[16]This understandable lack of sophistication in constitutional litigation is amply illustrated in the record before us. In the official letter to appellants' parents explaining their actions, school officials earnestly claimed that their power to punish rested on the fact that *Hard Times* was "morally offensive, indecent, and obscene." Apparently, the appellees believed these three descriptive words to be virtually synonymous, and, therefore, of equivalent legal significance.

In a system of free expression premised in part on the availability of an impartial arbiter, such an unreviewable sanction must be confined to a rigidly restricted area. When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself. *See Eisner, supra,* 440 F.2d at 808; *Shanley, supra,* 462 F.2d at 966.[17]

[17]We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale. We need not, however, address this scenario because, on the facts before us, there was simply no threat or forecast of material and substantial disruption within the school. Indeed, school officials were content to do nothing at all for six full days, until called to action by the school board president. Even after their investigation, school officials imposed punishment only because they believed *Hard Times* was "morally offensive, indecent, and obscene," not because they feared disruption. No forecast of possible interference with the operation of the school was made until litigation had commenced. The evidence presented by appellees consisted merely of Board President Tatko's professed "shock," and the after-the-fact "predictions" of three school administrators from surrounding communities that *Hard Times* could conceivably imperil academic discipline. These predictions are convincingly repudiated by uncontradicted evidence that Granville Junior-Senior High School continued to operate normally after all but seven of the one hundred copies of *Hard Times* had been sold, and that school-wide examinations were held without incident. Thus, the school officials' "undifferentiated fear or apprehension of disturbance," *Tinker, supra,* 393 U.S. at 508, is of no consequence.

IV

On the record before us, we are unable to ascertain the current status of the sanctions imposed against these students. Moreover, we are uncertain of the precise nature of the relief requested.[18] We therefore express no

[18]Specifically, although appellants' amended complaint sought an injunction permitting on-campus distribution of *Hard Times*, they appear to have abandoned this claim on appeal. *See* Brief of Appellants at 51. Thus, we have assumed, for purposes of this opinion, that appellants do not seek to distribute their newspaper on the grounds of Granville Junior-Senior High School. Moreover, if the appellants were to renew their claim, we would require development of a more complete record relating to whether portions of *Hard Times* are unprotected by the First Amendment because they are not suitable for distribution to children in school. *See Ginsberg v. New York*, 390 U.S. 629 (1968). Because Judge Foley did not address this issue, we believe it is inappropriate to reach the question for the first time on appeal.

Our brother Newman, however, proceeds as if the issue of on-campus distribution is before this court, and that it must be decided in favor of the appellees. Although Judge Newman's analysis is of general interest, we find several aspects of it troubling. Initially, we recognize that school officials can punish in-school expression by students that would be fully protected in the adult world. *See* Part IIB *supra;* Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321 (1979). We would hesitate, however, to conclude that the obvious need for a flexible application of the First Amendment in the school setting allows educational officials free-wheeling and unbridled discretion to prohibit expression they regard as indecent, even within the narrow confines of the schoolhouse.

Moreover, we have difficulty with Judge Newman's footnote suggesting that school officials can regulate allegedly "indecent" expression by students in the general community. We do not doubt that the state can appropriately legislate a state-wide "variable" standard of obscenity with respect to children, *see Ginsberg, supra,* or that, in some circumstances, expression that is suitable for adults can be suppressed because of its potential

(footnote continued)

effect on children, *see FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). Nevertheless, we believe that this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result. If this is to be the standard, we cannot avoid asking if the proprietor of Stewart's, the store adjacent to Granville High School, could be punished by the *Board of Education* for selling the *National Lampoon* so close to the school? Surely, it is "reasonably foreseeable" that the magazine would find its way into the school. Moreover, if the educational interest vindicated by school officials is the need "to promote standards of decency and civility among school children," *see* p. *infra* (Newman, J., concurring), a concept attractive on its face but necessarily elusive if not impossible to apply evenhandedly, it is not apparent why educators would not be permitted to fail a student in an English course for writing a scurrilous letter to the *New York Times*. If the letter is composed by a classmate, is it not reasonably foreseeable that fellow students will circulate it within the school? Indeed, if an off-campus publication includes criticism of the school itself, we assume the foreseeability of distribution within the school increases. Thus, in this not infrequent situation, this standard invites school officials "to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views." *Cohen v. California,* 403 U.S. 15, 26 (1971).

Equally disturbing is the unavoidable interference with the proper role of parents contemplated by Judge Newman's approach. Both *Ginsberg* and *Pacifica* premise their analysis on a recognition that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Ginsberg, supra,* 390 U.S. at 639 (quoting *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944)). *Ginsberg* upheld a prohibition on sales of "girlie" magazines to minors because parents could, if they wished, purchase periodicals for their children. In *Pacifica,* a parent complained that unwelcome expression was thrust upon him and his young son. In the instant case, however, a parent who believed *Hard Times* was a harmless prank is powerless to erase his child's suspension, and the child whose parents deemed the paper acceptable reading cannot obtain a copy. Indeed, it is not without significance that the parents of three of the appellants in this case brought suit on behalf of their children.

opinion as to the form of relief that should be granted, but reverse and remand to the district court for further proceedings consistent with this opinion.

NEWMAN, *Circuit Judge,* Concurring in the result:

The issues in this case concern both off-campus and on-campus distribution of an unofficial student newspaper containing numerous examples of language that is, beyond dispute, indecent, though the publication as a whole may well not be obscene. These issues arise in a case where the school authorities have consistently disclaimed any interest in disciplining students for activity *off* school property and the students have demanded, but not yet exercised, the right to distribute their publication *on* school property.

I concur in the judgment remanding to vacate the sanctions imposed because I agree that school discipline was improperly imposed upon the students for their essentially off-campus activity. The students endeavored to keep their publication and distribution activities off the campus and, for all practical purposes, succeeded. The school authorities had explicitly informed the students that no disciplinary action would be taken if the students kept their publishing activities off school property. Whatever notice requirements the Due Process Clause mandates before student discipline may be imposed, see *Goss v. Lopez,* 419 U.S. 565 (1975), there can be no doubt that discipline imposed exactly contrary to the announced standards of school authorities is constitutionally impermissible.[1] Thus the conclusion that the

[1]In the District Court the students abandoned all contentions that they were denied procedural due process in connection with the disciplinary proceedings themselves. Thus no claim is made that notice of those proceedings was in any way deficient. But there has been no abandonment of the basic due process claim that discipline may not be imposed for off-campus activity when the school had announced its toleration of such activity.

students were in fact disciplined for off-campus activity suffices to establish that their discipline was imposed in violation of the Fourteenth Amendment.[2] But that is only half the case. Since the students in their amended complaint sought relief entitling them to distribute their publication *on* school property and since the school warned them such activity would incur the risk of punishment, it must also be decided whether the school may regulate the on-campus distribution of the students' publication.[3]

[2]In agreeing that the discipline was imposed for activity that, as we assess it, occurred almost entirely off campus, I make no accusation that the school authorities have sought to extend their dominion beyond the school house gate or have ventured into the general community. They have sought to do precisely the opposite, *i.e.*, exercise authority only for on-campus activity. They thought the on-campus activity was significant. We disagree. We are entitled, with constitutional issues at stake, to disagree with their assessment of the facts, but they are entitled to be spared criticism for seeking power they have explicitly disclaimed. In light of the school's announced policy to discipline only for on-campus publication, the discipline imposed in this case is properly vacated for failure of proof.

[3]The claim to on-campus distribution has not been abandoned by the appellants in this Court. The conclusion of their brief requests this Court to direct the District Court to grant relief requiring the school authorities to "(1) Cease *all* seizures and punishments for student publication unless and until constitutionally adequate guidelines regulating student publications are adopted." (Appellants' Brief 51) (Emphasis added). This requested prohibition against *any* regulation, without prior guidelines, is explicitly stated earlier in the brief to be a demand, as expressed in the amended complaint, to "sell 'Hard Times' on school grounds . . . ." (Appellants' Brief 14). As the brief further states, "Plaintiffs contend that any regulation of their free speech, such as regulation of 'Hard Times' on or off school grounds, must be based on specific written regulations . . . ." *Ibid.* It was this contention that the District Judge rejected when he ruled that plaintiffs are not entitled to the permanent injunction they seek.

That question requires consideration of whether the on-campus distribution of this publication is protected by the First Amendment.

It is not disputed that the student publication "Hard Times" contains more than isolated examples of language that is, by contemporary standards, indecent and vulgar for school-age children. The pages of the federal reports will not be enriched by their repetition. The students responsible for the publication proudly labeled it "vulgar." This was not false advertising.

There is no question that student expression enjoys First Amendment protection. *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969). When school authorities seek to punish the expression of opinion, they must be prepared to demonstrate the existence of facts that might reasonably have led them "to forecast substantial disruption of or material interference with school activities." *Id.* at 514.[4] In the trial of this case, both sides appeared to assume that the *Tinker* test of a predictable disruption is the standard for regulating not only the expression of views and opinions but also the language used.[5] Yet nothing in *Tinker* suggests that

[4]*Tinker* was concerned with school efforts to regulate the expression of a particular opinion—opposition to the Vietnam War. The case can be read more broadly, but not unreasonably, to protect against regulation of all expressions of opinion.

[5]Other courts have applied the *Tinker* test of a predictable disruption to school authorities' attempts to regulate student publications because of the contents of the ideas being expressed. *Shanley v. Northeast Independent School District, Bexar County, Texas,* 462 F.2d 960 (5th Cir. 1972); *Scoville v. Board of Education of Joliet Township High School District 204,* 425 F.2d 10 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970); *Bayer v. Kinzler,* 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without opinion,* 515 F.2d 504 (2d Cir. 1975); *cf. Quarterman v. Byrd* 453 F.2d 54 (4th Cir. 1971); *Gambino v. Fairfax County School Board,* 429 F. Supp. 731 (E.D. Va.), *aff'd,* 564 F.2d 157 (4th Cir. 1977).

school regulation of indecent language must satisfy the criterion of a predictable disruption.[6] Two other decisions of the Supreme Court have grappled with the specific issue of regulating indecent language, and the sum of their teaching indicates that the Court would not accord First Amendment protection to indecent language in a student publication distributed to high school students on school property.

(footnote continued)

In *Jacobs v. Board of School Commissioners,* 490 F.2d 601, 610 (7th Cir. 1973), *vacated as moot,* 420 U.S. 128 (1975), the Seventh Circuit applied the *Tinker* test to the use of questionable language in a student publication, holding 2 to 1 that the publication could not be regulated because of "the occasional presence of earthy words." The decision rested primarily, however, on the vagueness and overbreadth of the challenged regulation.

Scoville may also suggest that the *Tinker* standard applies to language in a student publication. The Court observed that "students in high school are not insulated from . . . shocking but legally accepted language . . . ." 425 F.2d at 14. However, that decision invalidated discipline administered because of the views expressed in an article urging students to ignore a school pamphlet. An isolated remark in questionable taste referred to by the Court appeared in another article and does not appear to have been the basis for any school discipline.

[6]When Justice Fortas in *Tinker* formulated the predictable disruption test to safeguard a student's expression of an opinion, he was not facing any issue concerning on-campus distribution of indecent language to children. Later, when the Court explicitly upheld state power to punish distribution to children of publications not obscene by adult standards, *Ginsberg v. New York,* 390 U.S. 629 (1968), Justice Fortas dissented not to protest the adult-child distinction, but only to challenge a penalty imposed without evidence of fault by the distributor. At the same time, the author of *Tinker* made clear that when the buyers are children, "pushers or panderers of vulgar literature" may be punished. *Id.* at 674.

In *Cohen v. California,* 403 U.S. 15 (1971), the Court considered the criminal conviction of a protester of the Vietnam War for breaching the peace by offensive conduct. The conduct California sought to punish was the wearing in a courthouse corridor of a jacket bearing the words "Fuck the Draft." The Court invalidated the conviction, finding this use of language protected by the First Amendment. Justice Harlan initially observed that "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual . . . to use any form of address in any circumstances that he chooses." *Id.* at 19. Justice Harlan acknowledged that "certain kinds of otherwise permissible speech" need not be "tolerated in certain places," *ibid.,* thereby recognizing the potential applicability of time, place, and manner regulation to indecent language. However, the breach of peace conviction was not upheld as a time and place regulation because the state criminal statute gave no reasonable notice of "distinctions between certain locations." *Ibid.*

Cohen also considered the sensitive issue of whether, apart from time, place, and manner regulation, government has any legitimate interest in regulating the public use of indecent language out of concern for the sensibilities of those who might be offended. Though he had previously identified "protecting the sensibilities of passers-by" as a state interest worthy of consideration, *Street v. New York,* 394 U.S. 576, 591 (1969),[7] Justice Harlan declined to permit this interest to validate Cohen's conviction. This conclusion appears to rest on two different sets of reasons. The first concerns the risks encountered if regulation is permitted on this basis.

[7]See also the concern expressed by Justice Powell about "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Rosenfeld v. New Jersey,* 408 U.S. 901, 905 (1972) (Powell, J., dissenting).

Plainly concerned about a government attempt to "excise . . . one particular scurrilous epithet from the public discourse," 403 U.S. at 22, Justice Harlan warned that forbidding particular words runs "a substantial risk of suppressing ideas" or at least lessening the "emotive . . . force . . . of the overall message sought to be communicated." *Id.* at 26. He also questioned whether principled distinctions could be made in determining any limit to a governmental power to regulate indecent speech. *Id.* at 25. The second set of reasons focused on the choices available to members of the public. For most, the choice of "averting their eyes" was apparently sufficient. *Id.* at 21. If there were those "powerless to avoid" the epithet on Cohen's jacket, they had the choice of indicating their objection, and Justice Harlan suggested that evidence of such objection might justify regulation, at least under a statute evincing special concern with the plight of the captive listener or viewer. *Id.* at 22.

In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the Court again considered the public use of indecent speech.[8] The Court upheld the authority of the F.C.C. to consider broad-

[8]In the interim between *Cohen* and *Pacifica* the Court invalidated several convictions for public use of indecent language on the ground that the statute or ordinance under which the conviction had been obtained violated First Amendment standards because of overbreadth. *Lewis v. City of New Orleans,* 415 U.S. 130 (1974); *Plummer v. City of Columbus,* 414 U.S. 2 (1973); *Cason v. City of Columbus,* 409 U.S. 1053 (1972); *Rosenfeld v. New Jersey,* 408 U.S. 901 (1972); *Lewis v. City of New Orleans,* 408 U.S. 913 (1972); *Brown v. Oklahoma,* 408 U.S. 914 (1972); *Gooding v. Wilson,* 405 U.S. 518 (1972). In two instances *Cohen* was directly applied. *Hess v. Indiana,* 414 U.S. 105 (1973); *Papish v. Board of Curators of the University of Missouri,* 410 U.S. 667 (1973).

casting of indecent language as the basis for administrative sanctions. Two aspects of that decision are pertinent to this case. First, Justice Stevens, writing the plurality opinion, distinguished between governmental authority to regulate "a point of view" and "the way in which it is expressed." *Id.* at 746 n. 22. As he observed, "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n. 18. Second, Justice Stevens grounded the Commission's authority significantly upon a legitimate governmental interest in regulating indecent language easily accessible to children. See *Ginsberg v. New York,* 390 U.S. 629 (1968). The Commission itself had made clear that it intended no absolute prohibition on the use of the indecent language, but "sought to channel it to times of day when children would not be exposed to it." 59 F.C.C.2d 892 (1976). The availability of the 2 p.m. broadcast to children was of obvious concern in both the plurality and concurring opinions of the Court. 438 U.S. at 749-50, 757-59.

From these decisions, it is clear that speech that is indecent though not obscene can be regulated in some circumstances. Broad regulation that threatens to delete certain words from the language faces First Amendment barriers likely to be insurmountable, but limited regulation concerned with special places, special times, and special audiences may well be valid depending on the precise circumstances involved. Such limited regulation is well within the time, place, and manner authority

recognized in *Cohen,*[9] and poses no threat of deleting certain words from public discourse. Moreover, the element of choice on the part of the viewing or listening public, so central to the reasoning in *Cohen,*[10] has not been considered to be sufficiently present where juvenile audiences are involved. See *Ginsberg v. New York, supra,* 390 U.S. at 649-650 (Stewart, J., concurring). When, as in this case, the audience at which a publication is specifically directed consists solely of high school students,[11]

[9]It must be acknowledged that this is not traditional time, place, and manner regulation, which is "applicable to all speech irrespective of content." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975). But regulation as to time and place solely because of the language used was plainly suggested in *Cohen* and explicitly upheld in *Pacifica.* Other courts have approved time and place regulation based on the language used to express an opinion, as distinguished from the content of the opinion itself. *Durkin v. Taylor,* 444 F. Supp. 879 (E.D. Va. 1977) (prison); *Baker v. Downey City Board of Education,* 307 F. Supp. 517, 527 (C.D. Cal. 1969) (high school); *see Webb v. Lake Mills Community School District,* 344 F. Supp. 791 (N.D. Iowa 1972) (high school theatre); *Pervis v. LaMarque Independent School District,* 328 F. Supp. 638 (S.D. Tex. 1971) (high school), *rev'd on other grounds,* 466 F.2d 1054 (5th Cir. 1972).

[10]In authoring *Cohen,* Justice Harlan could not have intended to create First Amendment protection for use of indecent language on a high school campus. He had dissented in *Tinker* when protection was extended to the entirely respectful display of an armband. 393 U.S. at 526 (Harlan, J., dissenting).

[11]In this respect this case is unlike *Papish v. Board of Curators of the University of Missouri,* 410 U.S. 667 (1973), in which a student newspaper containing indecent language was protected on a university campus, notwithstanding the presence of some visiting high school seniors on the campus at the time of its distribution. *Id.* at 668 n.3. *See also Rowan v. United States Post Office Department,* 397 U.S. 728, 741 (1970) (Brennan, J., concurring, expressing concern about regulating distribution of mailed matter to "children in their late teens").

and distribution is demanded at a school building attended by students down to the age of 11,[12] First Amendment protection is not available for language that is indisputably indecent. If the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds.

Justice Harlan was quite right to caution in *Cohen* that regulation of particular language runs some risk of regulating the expression of ideas. Justice Stevens in *Pacifica* may have discounted that risk too easily. But whatever the risk in the context of adult communication, it does not warrant an interpretation of the First Amendment that forbids school authorities from trying to regulate the distribution of indecent language to its students. Nor does the validity of such regulation depend on whether the use of such language will predictably lead to disruption.

School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. The task may be difficult, perhaps unlikely ever to be more than marginally successful. But whether a school condemns or tolerates indecent language within its sphere of authority will have significance for the future of that school and of its students. The First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency. With its captive audience of children, many of whom, along with their parents, legitimately expect reasonable regulation, a school need not capitulate to a student's preference for

[12]The Granville Junior-Senior High School, at which the plaintiffs seek the right to distribute their publication, is a single building for students in grades 7 through 12, the youngest of whom are age 11.

vulgar expression. A school's authority to condemn indecent language is not inconsistent with a student's right to express his views. In short, the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.

School authority to regulate indecent language aimed at school children can of course be abused, but school officials are not the final arbiters of their authority, nor do they have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric in student publications is not suppressed by prudish failures to distinguish the vigorous from the vulgar. But this case does not require the careful drawing of the line that would allow ample margin for forceful language appropriate to the ideas being expressed. The language used in "Hard Times" is clearly indecent for juvenile audiences by contemporary standards.

The District Court properly rejected the students' demand for the right to distribute their publication on school property. The extent to which school authority might be asserted for off-campus activities need not be determined, since the school has disclaimed such power.[13]

[13]I agree that school authority may be exercised for off-campus student activity, consistently with the First Amendment, whenever publication or other speech-related activity satisfies the *Tinker* test of creating a reasonable basis for forecasting interference or disruption of school activities. But there is no need to determine whether the *Tinker* standard was met in this case because discipline for off-campus activity was disclaimed by school authorities and therefore cannot be imposed consistently with the Due Process Clause.

Equally unnecessary for decision is the issue of whether the *Tinker* test is the only standard for determining whether school discipline may be imposed upon students for off-campus publication. I have expressed the view in the text, *supra*, that on-campus distribution may be regulated by student discipline when a publication containing clearly indecent language is circulated to

(footnote continued)

an audience of high school students. Though the issue need not now be decided, it may be seriously doubted whether, unless the *Tinker* standard is met, school authority to discipline students for circulating vulgar material to high school students ends at the perimeter of the school grounds. Other courts have upheld school discipline for distribution occurring just off school grounds, where circulation on school property was intended and predictable. *Sullivan v. Houston Independent School District*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); *Baker v. Downey City Board of Education* 307 F. Supp. 517 (C.D. Cal. 1969). School authorities ought to be accorded some latitude to regulate student activity that affects matter of legitimate concern to the school community, and territoriality is not necessarily a useful concept in determining the limit of their authority. Possibly the traditional standard of the law that holds a person responsible for the natural and reasonably foreseeable consequences of his action might have some pertinent applicability to the issue. A prudent application of the foreseeability concept, informed by First Amendment considerations, would surely be able to distinguish between extreme examples such as a student viewing an x-rated film on cable TV in his home and students publishing off-campus a vulgar newspaper that is aimed at students of a particular school, is sold exclusively to students of that school, and is distributed near the school grounds. The law is not incapable of distinguishing between activity that concerns the school community and activity that does not.

Whatever may be the reach of a school's power to regulate off-campus publication of indecent school-related materials, such issues need not be decided until a school asserts such authority.

Decision of Second Circuit Court of Appeals Refusing to Rehear Matter *en banc*.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of November, one thousand nine hundred and seventy-nine.

DONNA THOMAS, JOHN TIEDEMAN, by and through his parents Mr. and Mrs. Henry Tiedman, DAVID JONES, by and through his parents Mr. and Mrs. John E. Jones, RICHARD WILLIAMS, by and through his parents Mr. and Mrs. Arthur F. Williams,

Plaintiffs-Appellants,

against

BOARD OF EDUCATION, GRANVILLE CENTRAL SCHOOL DISTRICT, WILLIAM E. BUTLER, DON L. MILLER, FREDERICK J. REED, BEVERLY TATKO, ROBERT L. FLOWER, TERRY M. KNIPES, WALTER PERRY III, FRANK P. VILLANO, DONALD BINCK, MARIE VANDERMINDEN, and THERESA MCCAULIFFE, each individually and in their official capacities,

Defendants-Appellees.

Docket No. 79-7382

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the defendants-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

IRVING R. KAUFMAN
Chief Judge

Decision of Second Circuit Court of Appeals Denying Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-nine.

Present:

Hon. Irving R. Kaufman,
Chief Judge,
Hon. Jon O. Newman,
Hon. Amalya L. Kearse,
Circuit Judges.

DONNA THOMAS, JOHN TIEDEMAN, by and through his parents Mr. and Mrs. Henry Tiedman, DAVID JONES, by and through his parents Mr. and Mrs. John E. Jones, RICHARD WILLIAMS, by and through his parents Mr. and Mrs. Arthur F. Williams,

Plaintiffs-Appellants,

against

BOARD OF EDUCATION, GRANVILLE CENTRAL SCHOOL DISTRICT, WILLIAM E. BUTLER, DON L. MILLER, FREDERICK J. REED, BEVERLY TATKO, ROBERT L. FLOWER, TERRY M. KNIPES, WALTER PERRY III, FRANK P. VILLANO, DONALD BINCK, MARIE VANDERMINDEN, and THERESA MCCAULIFFE, each individually and in their official capacities,

Defendants-Appellees.

Docket No. 79-7382

A petition for a rehearing having been filed herein by counsel for the defendants-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

Decision of U. S. District Court for the Northern District of New York Denying Preliminary Injunction.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

DONNA THOMAS; JOHN TIEDEMAN, by and through his parents Mr. and Mrs. Henry Tiedeman; DAVID JONES, by and through his parents Mr. and Mrs. John E. Jones; RICHARD WILLIAMS, by and through his parents Mr. and Mrs. Arthur F. Williams,

Plaintiffs,

against

BOARD OF EDUCATION, GRANVILLE CENTRAL SCHOOL DISTRICT; WILLIAM E. BUTLER; DON L. MILLER; FREDERICK J. REED; BEVERLY TATKO; ROBERT L. FLOWER; TERRY M. KNIPES; WALTER PERRY, III; FRANK P. VILLANO; DONALD BINCK; MARIE VANDERMINDEN; and THERESA MCCAULIFFE; each individually and in their official capacities,

Defendants.

79-CV-80

Appearances:

New York Civil Liberties Union, Attorneys for Plaintiffs, 84 Fifth Avenue, New York, New York 10011.

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Of Counsel:

Richard Emery.

Richard B. Wolf, 67 Dove Street, Albany, New York 12210.

H. Wayne Judge.

JAMES T. FOLEY, D. J.:

Memorandum-Decision and Order

In the hearing held on a motion for a preliminary injunction in this civil rights action, it was testified that there was nothing to do in Granville in the dreary winter months and certain junior and senior students in Granville Junior-Senior High School decided to start a newspaper. Granville is a rural community of about 3,000 population in Washington County, New York. One student testified there was no entertainment for them, and the composition, publication and distribution of a newspaper or magazine seemed to be the proper outlet for their energies. Although there was no testimony concerning the subject, it must be assumed the historic village of Granville and its high school had the usual high school sports, dances, and academic activities. Of course, the rugged winter temperature invited ice fishing, ice skating, skiing, tobogganing, and other outdoor activities of that kind.

The students, however, persisted in their newspaper idea, and the result was a xeroxed 13-page newspaper entitled "Hard Times". Plaintiffs' Exhibit 1 in evidence at the hearing. If the winter was becoming too dull in Granville, the distribution and sale of this newspaper, with its complete sexual format and content, on the streets and places near the high school to its students, changed that dullness and stirred the small village from any winter slumber it may have been in. The newspaper gives the best description of the content with the slanted banner across the front page "Uncensored—Vulgar—Immoral !!!". The front page notes in large caps "Special Editorial"—and that reference is to the next page: "EDITORIAL: A Close-up on Masturbation", a detailed writing in blunt wording. There is no need to describe the remainder of the content except to say that throughout it follows along the same line of expression. Anyway, the content immediately upset parents of students and the school authorities, as being shocking, vulgar, and filthy. It should be noted that this was also the initial reaction of the parents themselves of the student plaintiffs. The outgrowth of all this was the imposition of disciplinary measures after careful consideration and interviews by the school authorities. The plaintiffs challenge this action of the school authorities, claiming that their First Amendment rights of free speech had been violated in the suppression of this unauthorized newspaper.

It is hard for my mind to accept with equanimity the proposition that this high school adventure, similar to the expected high school pranks that often occur, rises to the stature of a federal constitutional case. The consequences of the sudents' conduct, and it should hardly be characterized as entertainment, was to be witnesses in a federal civil action here in Albany, at which the school administrators and teachers were compelled to take the

witness stand as well as to be deposed at the Granville Junior-Senior High School. A concomitant result was the students' absence from their regularly scheduled classes; and, the administrators' absence from their important educational and administrative responsibilities. Moreover, the case attracted newspaper and television coverage.

The problem, in my judgment, seems particularly one for solution within the public education system of New York which is noted for its safeguards and reviews in matters of this kind. I am confident that as the years go on, this escapade will be the prime topic of discussion at class reunions.

In *Goss v. Lopez,* 419 U.S. 565, 589-590 (1975), the dissenting opinion of Justice Powell noted:

> [T]his Court has explicitly recognized that school authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order. . . . Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision.

The limited role of the judiciary in the supervision of public education, therefore, arises only in those instances where the resolution of conflicts in the administration of a school system directly implicates fundamental constitutional values. *Tinker v. Des Moines School District,* 393 U.S. 503 (1969). *See generally, Ingraham v. Wright,* 430 U.S. 651 (1977).

In this action, the parties have thrust this Court into the educational "thicket" as a consequence of disciplinary action taken against four high school students arising out of their preparation and distribution of "Hard

Times," an unauthorized, or so-called underground ten-page newspaper or magazine which is, at best, a crude attempt to create sensational high school news in a small rural high school, and, at worst (at least in the eyes of the defendants), a patently offensive and vulgar attempt to enter the high school newspaper world. The plaintiffs through their counsel argue that the disciplinary measures imposed upon them by the school authorities violate their constitutional rights under the First and Fourteenth Amendments.

The plaintiffs, Donna Thomas, John Tiedeman, David Jones and Richard Williams, juniors and senior in Granville Junior-Senior High School, three of whom are represented by their parents because of their minority, commenced this action for declaratory and injunctive relief by the filing of a complaint on February 6, 1979. That complaint also sought temporary injunctive relief. The defendants are: the Board of Education of the Granville Central School District; the members of the Board; William E. Butler, Principal of the Granville Junior-Senior High School; Frederick J. Reed, the Assistant Principal; and Donald L. Miller, District Principal for the Granville Central School District.

Plaintiffs base their claim for relief upon 42 U.S.C. §1983, and, its jurisdictional counterpart, 28 U.S.C. §1343 (3). At present, there is no basis for entertaining a claim for relief directly under the First Amendment with 28 U.S.C. §1331(a) as a jurisdictional predicate. *See Turpin v. Mailot,* F.2d , Slip Op. 5403 (2d Cir. Jan. 16, 1979). *See also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* U.S. , 47 U.S.L.W. 4256, 4258 (U.S., March 5, 1979).

A chronological recitation of the proceedings in this Court and the factual background is set forth:

This Court heard oral arguments on the application for temporary restraining order on Tuesday, February 6,

1979. At that time, the Court denied injunctive relief as it was sought regarding the discipline imposed upon the students; namely, the five-day suspension, of which only one day remained at the time of the hearing, and, the segregation of the students from the remaining student body in separate study halls for the month of February. The Court did enjoin the school officials from directing the students to write an essay on the subject "Potential Harm to People Caused by the Publication of Irresponsible and/or Obscene Writing." Finally, the Court signed an order to show cause for a hearing upon a preliminary injunction to be held February 21, 1979.

On Friday, February 9, 1979, plaintiffs sought leave of the Court to take depositions of certain defendants. This motion was made returnable on Monday, February 12, 1979, at which time the Court granted plaintiffs' motion as well as defendants' oral cross-motion for leave to take the depositions of certain plaintiffs. Those depositions were taken at the Granville Junior-Senior High School on February 14 and 15, 1979.

At the February 21, 1979, Court Hearing, plaintiffs called eight witnesses, the defendants four witnesses, those being the principal defendants in the action. The only issues addressed at the hearing centered upon the First Amendment inasmuch as plaintiffs' first amended complaint, filed February 20, 1979, specifically withdrew any claims in the original complaint based upon the Due Process Clause. *See Goss v. Lopez, supra,* 419 U.S. 565.

As gleaned from the supporting depositions, affidavits and testimony of the parties at the hearing, these essential facts were shown not to be disputed.

The students, Donna Thomas, John Tiedeman, David Jones and Richard Williams, conceived of the idea of creating a satirical and racy publication during November and December 1978. By their own testimony, it was

their purpose to create something analogous to the National Lampoon, a monthly magazine of national circulation, the content of which is heavily weighted toward spoofs of sexual behavior. Enthused with this basic conception, the four students began discussing the subject during their after school study hours. These "thought" sessions usually were conducted in the classroom of one of their teachers, George Mager; and, continued throughout most of January 1979.

During the course of their discussions, planning and formulation of the publication, these students also solicited ideas and assistance from their fellow students. As the newspaper, eventually known as "Hard Times," approached the stage of definite publication, portions of the new journalistic endeavor were carried out on school grounds with the admitted use of school property. That is, it is clear in the record that some of the writing, typing, editing and ultimately the storing of the paper occurred within the school.

Moreover, there is no dispute, and I find that George Mager's role in his contact with the newspaper effort was superficial to a great extent and limited largely to matters of correct punctuation, spelling and grammatical usage. He was aware of some parts of the content, and did not see the completed issue of the paper that was sold to the students on streets and locations near the school. It is noted and found that Mr. Mager advised the students that certain items could lead to trouble and suggested that they be deleted, especially the Editorial. In all fairness to Mr. Mager, there is evidence that he never really thought that any publication would eventually materialize; and, when it did become a reality, as noted, he was unaware of its final content. He did allow the paper to be stored in his classroom, a commitment he had made and did not withdraw upon learning that the paper was a reality. Professor Mager did admit he may have

been guilty of poor judgment, and it is apparent he did not perceive the commotion that was to arise.

The record also discloses that the photocopying of "Hard Times" was done at the office of a local manufacturing company, presumably by a friend of Donna Thomas. Approximately one hundred issues were photocopied and stapled.

There is some evidence in the record that Mr. Mager advised the students to sell "Hard Times" away from school; and that, in fact, approximately seventy copies were sold to students at Stewart's, a nearby store. There is some evidence that some issues may have been sold on school grounds. It is noted that the students testified that it was their policy not to sell "Hard Times" because of its own description of being vulgar to students in the seventh and eighth grades because they probably would not understand the attempted satirical nature of the contents. There is no evidence that any seventh or eighth graders purchased or were found possessing an issue of the paper, although the junior and senior high school students share the same school facilities.

The time frame for distribution of "Hard Times" was January 23-26, 1979. Inevitably, a copy of "Hard Times" surfaced in the school building on Wednesday, January 24. The paper had been taken from a ninth grade student by a teacher, who, at the end of the school day, brought it to the office of the high school principal, defendant Butler.

Upon reading it, the immediate response of Dr. Butler was to speak privately with District Principal Miller. This conversation took place that same afternoon of January 24; and, it was decided then that they would wait for further copies to appear as well as to monitor the photocopying equipment in the school's administrative offices. No further immediate action was taken by defendants Butler and Miller in their capacities as Principal and

School Superintendent due to the fact that, at this time, they had no knowledge of the source of "Hard Times;" and, more importantly, school-wide examinations were scheduled for Thursday and Friday, the administration of which would occupy most of their attention and energies, and should not be disrupted.

Although defendants Butler and Miller then were without knowledge as to the source of "Hard Times," defendant Reed, the Assistant Principal, knew its origins on January 24, the day on which the first issue showed up in the school. He could do so because of two events which took place approximately one week prior to the appearance of the paper.

The first such episode involved a brief conversation with Mr. Mager wherein the latter asked defendant Reed whether he had heard any rumors about a student publication. At that time, Mr. Mager disclosed the names of three students—Tiedeman, Williams and Jones—plaintiffs herein. No description of the contents of the paper was given.

Defendant Reed responded to this information by requesting John Tiedeman to come to his office. They talked about the general subject of a student publication. Mr. Reed related that the school was unconcerned about what the students did away from school. His concern was that some disciplinary action could be taken if there was some involvement on school grounds. Mr. Reed's other stated concern was to apprise John Tiedeman about the feelings of others, the nature of humor, and, the use of names of teachers and students which might lead to embarrassment and indignation. Generally, Mr. Reed's purpose was to discourage the students from publishing a paper since an underground newspaper published a number of years earlier resulted in disciplinary suspensions of the students involved. Nevertheless,

when John Tiedeman left the office, Mr. Reed had no way of knowing whether a paper would be published or not. But, when an issue did surface the following week, he immediately had a good idea of its origins.

There is evidence to the effect that following this conversation with Mr. Reed, substantial portions of "Hard Times" were edited by the students to excise those portions which used students' names (a rumor column).

On Monday, January 29, defendants Butler and Miller renewed their investigation regarding "Hard Times." Beverly Tatko, President of the Board of Education, saw an issue and requested to see Superintendent Miller because she was shocked by its content. In the office of Mr. Miller, with Dr. Butler present, she inquired about the newspaper, its circulation in school and what Mr. Miller and Dr. Butler intended to do about it. She stated that the paper was the worst thing she had ever seen. She also professed knowledge of Mr. Mager's participation in the paper, as well as knowledge of the names of the students involved. There were no discussions concerning disciplinary action, although Mrs. Tatko thought herself that discipline should be imposed. She did state, however, that if Dr. Butler and Mr. Miller did not feel as strongly about the paper as she did, then perhaps there should be a meeting of the Board of Education. To that end, she distributed and caused to be distributed, copies of "Hard Times" to the members of the Board of Education that same day. It is a fair assessment of the facts to conclude that the investigatory efforts of Dr. Butler and Mr. Miller became more intensive following the meeting with Mrs. Tatko. Mr. Miller did state, however, that it was his own decision to hold a Board meeting on Tuesday and Wednesday.

The course of the investigation began on Monday morning with Dr. Butler questioning Mr. Mager on the extent of his knowledge and participation in the preparation of "Hard Times." This conversation confirmed the

extent of Mr. Mager's previously stated knowledge and involvement with it. At that time, Dr. Butler took the copies that were left in Mr. Mager's storage closet.

Later that morning, Dr. Butler and Mr. Miller interviewed three of the students—Tiedeman, Williams and Jones. These conversations confirmed the facts concerning the preparation, publication and distribution of "Hard Times" as outlined above. Subsequent to these discussions, Donna Thomas was called to Dr. Butler's office; and, she similarly confirmed the accounts given by Tiedeman, Jones and Williams.

Dr. Butler also learned from these initial meetings that other students participated in the creation of "Hard Times" to varying degrees. Those students were interviewed on the following day, Tuesday, January 30.

At the end of the meetings with the principals on Monday, Dr. Butler and Mr. Miller reached a decision to have a meeting with the School Board and the parents of the students. The purpose was to find out whether the parents had discovered any facts regarding "Hard Times" which were different from or supplementary to those already discovered.

Following this meeting between Dr. Butler and Mr. Miller, all of the students, except Donna Thomas, requested to speak with Dr. Butler. The request was granted, and, the discussions reflected the students' anxiety as to the consequences of their conduct. Dr. Butler informed them that their conduct would be judged by the fact that school property and facilities were involved in the creation and distribution of "Hard Times." There was some discussion concerning suspension.

At the conclusion of the first meeting of parents, admittedly shocked themselves upon a first reading of the newspaper, the Board of Education, Mr. Miller and Dr. Butler, a decision was reached, outside the presence of parents, that suspensions should be imposed upon the key actors.

This decision was not premised upon the violation of any particular rule concerning publication of student newspapers; but, instead, was based upon a uniform consensus, including the parents, that the students had done something wrong. In fact, there are no written school rules concerning student publications.

The Wednesday, January 31 meeting with the parents of those students having only minor involvement was conducted without the School Board, presumably, the latter deciding that the principals in the publication and distribution of "Hard Times" was their principal concern. No discipline was imposed upon the students with minor involvement.

The five-day suspension of Tiedeman, Jones, Williams and Thomas was said to be officially premised upon Regulation No. 5114. The propriety of the suspension it is contended is supported by N.Y. Ed. Law §3214-3 which permits suspension of

> A pupil who is insubordinate, or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others.

It is further noted that suspensions in excess of five days are subject to a full panoply of procedural due process measures. N.Y. Ed. Law §3214-3c. Plaintiffs do not challenge the school regulation, the statute or the procedural means employed in imposing the suspensions here. N.Y. Ed. Law §3214(3) (d), (e). The details concerning the imposition of discipline were finalized by defendants Butler and Miller on Wednesday, January 31.

The suspensions were effective Thursday, February 1, and terminated Wednesday, February 7. The students resumed classes on Thursday, February 8. The students were personally contacted by Dr. Butler on Thursday, February 1, and told of the sanctions and the reasons for them. The parents of Donna Thomas, John Tiedeman

and David Jones met with Dr. Butler on Thursday and Friday, at which time the sanctions and explanations were again furnished. A formal letter, dated February 4, was sent to each parent.

This letter, written by Dr. Butler with the collaboration of Mr. Miller, characterized "Hard Times" as being "morally offensive, indecedent and obscene." He gave the same appraisal in his testimony at the court hearing. It further provided that "a reasonable Granville person" would reach that conclusion. Moreover, it was stated that "Hard Times" was "particularly inappropriate" in the context of a school which houses students in grades 7-12. Finally, it was stated that it was "inconceivable" that the paper "could be judged to have any redeeming social value in this community."

Another letter, dated February 4, 1979, was sent to Mr. Mager from Granville District Principal Miller. Mr. Miller's account of this letter was that it was intended merely as a summary of their discussions regarding his involvement with "Hard Times." The letter did state:

> Assuming that all you have reported is true, in my opinion your professional judgment was lacking of the maturity and soundness I would have expected of you.

Upon the students return to school, the sanction of the segregated study halls was dropped for the sound reason it would attract too much attention to students already involved in a federal case. As previously noted, this Court enjoined the sanction of writing an essay on obscenity. My stated observation was that the Supreme Court is having great difficulty writing on that subject. The only consequences remaining from these sanctions is that plaintiff Thomas has lost her Senior Privileges; and, that a copy of the letter sent to the parents will be retained in the file of each student. In my judgment, there

could possibly be serious and irreparable consequences from such a record, even though the defendants Miller and Butler stated that the letter does not become part of the student's permanent record and is removed from the files upon the students leaving school.

The parties have devoted considerable attention to the question of obscenity. Plaintiffs presented an affidavit of Morris I. Berger, Professor of Education of the State University of New York, Albany. Dr. Berger also testified at the hearing and was qualified as an expert in the fields of educational administration, educational psychology and curriculum. He concluded that no competent school administrator would claim that the reading of "Hard Times" by Junior and Senior high school students would disrupt the educational process; there is no necessary causal relation between reading "Hard Times" and harm to a student's educational development; and, that such judgments or predictions are not supported by any evidence in the empirical studies of human behavior.

The defendants have submitted three affidavits in opposition. Dr. John G. Zeis, Chief School Officer of the Hudson Falls Central School District, read "Hard Times" and concluded that to permit publications of this nature would foster a breakdown of discipline in rural school districts where students, teachers and their respective families frequently socialize outside of the classroom environment; that permitting publications of this nature would be disruptive of the educational process due to disputes that would be triggered among parents/taxpayers who adhere to a broad range of religious persuasion; and, that publications such as "Hard Times" would be "particularly damaging in view of the special sensitivity of youngsters at the junior high school level."

Jack V. Irion, Superintendent of Schools for the Queensbury Union Free School District, read "Hard Times" and concluded that libelous and/or obscene ma-

terials serve no educational purpose; that slurs and innuendo of members of the student body destroy positive self-concepts and values that are integral to the educational process; and, that school authorities, representing parents of all students, have the responsibility to regulate the content and distribution of student publications.

William B. Wetherbee, Chief School Officer of the South Glens Falls Central School District, read "Hard Times" and concluded that it would be disruptive to the educational process and damaging to pupils, particularly at the junior high school level; that although publications with similar content are available outside of school, distribution through school channels would be harmful due to the obscene content; that school administrators have an obligation to serve the entire community; and, that given the pluralistic nature of the community served, permitting such publications in school can only serve to polarize the community with a concomitant disruption of the school program.

As previously noted, the plaintiffs seek declaratory and injunctive relief. More particularly, their amended complaint seeks a declaration that the seizure of "Hard Times" and the subsequent suspensions arising out of its publication, violated the First and Fourteenth Amendments; that threats of future seizure and punishment arising out of future issues of "Hard Times" violates the First and Fourteenth Amendments; and, that requiring publication wholly off school grounds violates the First and Fourteenth Amendments.

Plaintiffs' request for injunctive relief seeks to restrain defendants from imposing any disciplinary action for the production and distribution of "Hard Times." Plaintiffs also seek mandatory injunctive relief directing defendants to return all issues which were seized by the defendant, Butler; the expungement of all references to

the incident from plaintiffs' school records; and, to permit future sales and distribution of "Hard Times" on school grounds.

Finally, plaintiffs' amended complaint sets forth a claim for attorneys fees pursuant to the authority of 42 U.S.C. §1988, as amended.

Plaintiffs argue that the following theories support their claims for relief: 1) expression which is offensive but not obscene is protected by the First Amendment; 2) the First Amendment does not create distinctions between "in-school" and "off-school" as a basis for regulating expression; and, 3) the absence of specific regulations directed toward the subject of student publications renders defendants' actions in violation of the First Amendment.

DISCUSSION

The standards governing the issuance of injunctive relief in the Second Circuit have received thoughtful commentary and discussion, *see* Mulligan, Forward—Preliminary Injunction in the Second Circuit, 43 Brooklyn L. Rev. 831 (1977); *see also Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.,* F.2d , Slip Op. 1891, 1894-95, 1897-98 (2d Cir., March 23, 1979), and, as recently restated:

> clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., supra, at 1894. *Accord, Caulfield v. Board of Education,* 583 F.2d 605, 610 (2d Cir. 1978); *New York v. Nuclear Regutory Commission,* 550 F.2d 745, 750, 755 (2d Cir. 1977); *Triebwasser & Katz v. American Telephone & Telegraph Co.,* 535 F.2d 1356, 1358-59 (2d Cir. 1976).

For purposes of this case, it must be noted that plaintiffs bear a heavier burden of persuasion "where the grant of interim relief may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond." *Medical Society of New York v. Toia,* 560 F.2d 535, 538 (2d Cir. 1977). And, where plaintiffs seek mandatory injunctive relief, there is a "traditional reluctance" to grant such relief. *Jacobson & Co., Inc. v. Armstrong Cork Co.,* 548 F.2d 438, 441-42, nn. 2, 3, 4 (2d Cir. 1977).

As previously noted, this Court has serious misgivings regarding the plaintiffs' claims that the action taken by the school administrators implicates any of the plaintiffs' fundamental First Amendment rights. To my mind, the conduct throughout was nothing more than an appropriate exercise of the educational authorities' discretion to impose discipline upon insubordinate students. Nevertheless, for purposes of this discussion, there are high level First Amendment cases that I believe support the decision herein.

As a threshold matter, this Court does not deem it necessary to become entangled in the illusive concept of obscenity. The Court is on firmer ground in its reliance upon the principles enunciated in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker* affords a framework for examining student rights of free expression measured against the comprehensive authority of school officials to prescribe and control conduct in the schools. In regulating or prohibiting student expression, the burden rests upon school officials to:

> demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.

Id. at 514. *Accord, Trachtman v. Anker,* 563 F.2d 512, 517 (2d Cir. 1977), *cert. denied,* 435 U.S. 925 (1978); *Shanley v. Northeast Independent School District,* 462 F.2d 960, 970-71 (5th Cir. 1972); *Eisner v. Stamford Board of Education,* 440 F.2d 803, 807 (2d Cir. 1971).

Tinker also made it clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," 393 U.S. at 508; and, that to justify a curtailment of expression, the school officials must be able to show that their action was "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." 393 U.S. at 509.

It is clear that the "reasonable forecast" premise of *Tinker* does not require school administrators to wait for potential harm to occur prior to taking some protective action. Similarly, given the special and unique environment of our elementary and secondary public school systems, the exercise of the right of expression by the students in those settings is subject to certain constraints which are more restrictive than those normally imposed upon First Amendment freedoms.

To be sure, it appears that the content of "Hard Times," and, the use of school property in its creation, were the major factors in the decision to impose discipline upon the students. Nevertheless, this Court's discussion proceeds upon the premise that at least some portions of "Hard Times" constituted "protected speech." It would be difficult to disagree with the appraisal that "Hard Times" is not in good taste and filthy, particularly so, in light of the lead editorial on masturbation.

Plaintiffs' First Amendment arguments place considerable reliance upon the school authorities value judgments concerning "Hard Times." In doing so, they overlook several important facts which appear on the record.

First, it is evident that as a consequence of Assistant Principal Reed's meeting with John Tiedeman prior to the publication of "Hard Times," the students were cautioned that disciplinary measures could be taken for publication of a newspaper where school property was involved in its production, and, where the use of student names would cause personal embarrassment to the named students. The Court therefore finds that the students were warned that disciplinary conduct could be imposed for publication of a newspaper based on the use of school facilities in its production as well as its content.

Of far greater significance are certain facts which reveal that the students so-called expression precipitated events which underscore that their conduct was potentially disruptive to discipline in the educational system of this rural community. The Court deems the following events important. As noted, the first copy of the paper surfaced in the school on Wednesday, January 24. Given the fact that school-wide examinations were scheduled for Thursday and Friday, defendants Butler and Miller sensibly refrained from disrupting the administration of these exams. The consequence of this delay was that for five days—January 24-28—Mrs. Beverly Tatko, President of the Board of Education, became aware of "Hard Times" when her son brought a copy home. She was shocked by its content as were the parents of the plaintiff students. She realized that the publication had come from students in the Granville Junior-Senior High School.

During her meeting with defendants Butler and Miller on January 29, she stated that if the latter did not share her sentiments, then perhaps they would be reluctant to do anything about it. She suggested that inasmuch as nothing had been done as yet, perhaps a meeting of the Board of Education should be scheduled. Although Mrs. Tatko may not have perceived that the incident was

primarily one for concern of the Board; nevertheless, it is a fair assessment of the record that Mrs. Tatko was firmly convinced that disciplinary action should be taken against the students involved, and, to that end, she would have sought the consensus of the entire Board. Arguably, however, her legitimate and obvious concern was with a perceived disruption of discipline in the school.

This assessment is also reinforced by the inquiry directed to Dr. Butler by John Tiedeman's mother on February 1, the first day of suspension. She inquired about the school officials' failure to stop publication of the newspaper.

In sum, it is my judgment that plaintiffs have failed to make a clear showing of likelihood of success on the merits of their *Tinker* arguments. The prohibition of "Hard Times," and the punishment of the students for its publication, I find were reasonable restraints upon expression which proceeded from insubordinate conduct in light of prior warnings; and, the potential disruption of discipline proceeding from such insubordination.

Plaintiffs' remaining contention that the absence of specific regulations governing student publications is impermissible per se, may be dealt with summarily. Their reliance upon *Shanley v. Northeastern Independent School District, supra,* 462 F.2d 960 and *Eisner v. Stamford Board of Education, supra,* 440 F.2d 803, is misplaced. These cases do not suggest, nor does the Constitution require, a particularized rule extending to every conceivable aspect of high school student conduct before school administrators can discipline.

Eisner and *Shanley* do not mandate that a school board promulgate a particular policy regarding student publications. However, where a school board does elect to promulgate such policies, these cases do require that such policy statements conform to the standards governing overbreadth, vagueness and Due Process.

In light of plaintiffs' failure to make a clear showing of likelihood of success on the merits of their First Amendment contentions, it follows that plaintiffs have also failed to make a clear showing of some threat of irreparable harm. *See Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., supra.*

Indeed, at this stage of the litigation, most of the sanctions imposed by the defendants have either been terminated, withdrawn or enjoined. It is true that Donna Thomas has lost her Senior Privileges, although this Court has not been informed whether those privileges may have been restored.

At the conclusion of the preliminary injunction hearing, I stated my concern with the entry of the letter of discipline upon the student records. I stated that such records could irreparably harm these students later in life as they seek any type employment or entry into college or public service. There was some discussion concerning an offer by defendants to voluntarily expunge the record of these letters; however, these discussions did not result in any definite decision in that regard. I believe expungement should be carefully considered again.

The Court regards these "blemishes" as unfortunate, and they are the result of an error of judgment by young high school students. At this stage of the litigation, however, the Court declines to direct expungement.

It is becoming increasingly evident that today's high school students bear little resemblance to their counterparts of a generation ago. In any event, in recognition of the myriad and vital responsibilities that school authorities undertake, the federal courts are instructed to heed the salutary principle that the administration of the public schools is primarily one for local concern. The defendants herein exercised their discretionary authority in a proper manner consonant with specific constitutional

guarantees; therefore, there is no basis or constitutional grounds for the challenge to their exercise of discretion and judgment. *See Wood v. Strickland,* 420 U.S. 308, 326 (1975). The decisions were properly within their supervisory power to control the conduct of the students in the Granville Junior-Senior High School.

It is in deference to these principles that the Court has avoided the question of obscenity. The parties have presented affidavits which draw opposing conclusions as to what impact "Hard Times" may have on junior and senior high school students. The courts are generally ill-equipped to decide questions of this nature; and, are on firmer ground by applying, whenever possible, an "ascertainable jural principle." Friendly, The Courts and Social Policy: Substance and Procedure, 33 U. of Miami L. Rev. 21, 37 (1978). *See also* Moynihan, Social Science and the Courts, 54 Public Interest 12 (1979).

Plaintiffs' motion for a preliminary injunction is denied and dismissed. The foregoing memorandum-decision constitutes this Court's findings of fact and conclusions of law. Rule 52(a), Fed. R. Civ. Pro.

It is so Ordered.

Dated: May 2, 1979
Albany, New York

JAMES T. FOLEY
United States District Judge

Decision of U. S. District Court for the Northern District of New York Denying Permanent Injunction.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

DONNA THOMAS; JOHN TIEDEMAN, by and through his parents Mr. & Mrs. Henry Tiedeman; DAVID JONES, by and through his parents Mr. & Mrs. John E. Jones; RICHARD WILLIAMS, by and through his parents Mr. & Mrs. Arthur F. Williams,

Plaintiffs,

against

BOARD OF EDUCATION, GRANVILLE CENTRAL SCHOOL DISTRICT; WILLIAM E. BUTLER; DON L. MILLER; FREDERICK J. REED; BEVERLY TATKO; ROBERT L. FLOWER; TERRY M. KNIPES; WALTER PERRY, III; FRANK P. VILLANO; DONALD BINCK; MARIE VANDERMINDEN; and THERESA MCCAULIFFE; each individually and in their official capacities,

Defendants.

79-CV-80

Appearances: Of Counsel:

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New York Civil Liberties Union
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New York, N. Y. 10011
Attorney for Plaintiffs

Caffry, Pontiff, Stewart, Rhodes & Judge — H. Wayne Judge
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James T. Foley, D. J.

Memorandum-Decision and Order

In a twenty page memorandum-decision and order dated May 2, 1979, I denied and dismissed a motion by the plaintiffs for a preliminary injunction. The details of the fact finding from the affidavits and depositions submitted, and the evidence developed at an evidentiary hearing, led me to the conclusion that there was not sufficient showing of any First Amendment violations that would warrant the drastic relief of preliminary injunction that was mandatory in several of its aspects. Claimed violations of the Due Process Clause asserted in the original complaint had been withdrawn.

Attorney Richard Emery now files a motion for a Final Injunction pursuant to Fed. R. Civ. Pro. 65(a)(2). It is my recollection that I did not formally state or order for the record at the evidentiary hearing on the application for the preliminary injunction that the trial could be advanced and consolidated with the hearing on the application. This position was taken due to the opposition of the defendants' attorney to such consolidation. As alternative relief in the present motion, consolidation on the merits pursuant to Rule 65(a)(2) is requested.

The supporting affidavit of Attorney Emery states that plaintiffs have no more evidence to present. Attorney H. Wayne Judge states the same position in regard to submission of further evidence and stands upon the record made on the preliminary injunction application. He does not approve the consolidation of the proceedings on the merits under Rule 65(a)(2), but, as expected, does oppose the grant of final permanent injunction herein.

The only problem I see in the grant for the final injunction decision on the merits is that a Notice of Appeal has been filed before this motion was filed and served. Attorney Emery states this was done to preserve plaintiffs' appellate rights, and the Notice of Appeal filed will be amended or withdrawn to reflect the Court's final judgment. The question is whether the filing of the Notice of Appeal deprives the District Court of the power and jurisdiction to rule upon this motion. This is my first experience with a motion of this kind. Appeal lies of right from a refusal of a preliminary injunction under 28 U.S.C. 1292(a)(1). The usual course is to follow through with this appeal. The Circuit Court, if it sees fit, on its own may consider the merits of the case and order dismissal of the action. *See* Law of Federal Courts, 3rd Ed., p. 513; *Aerojet-General Corp. v. American Arbitration Ass'n,* 478 F.2d 248, 252-253 (9th Cir. 1973).

By reason of the concern that I may be intruding upon appellate court jurisdiction to govern and limit its appellate procedures, I shall grant the alternative relief requested, to which there is no opposition, and advance the hearing on the application for preliminary injunction for consolidation with trial on the merits. I do state that inasmuch as there is no further evidence to be presented by either side, my findings and conclusions would be the same as expressed in my decision of May 2, 1979. I would find that the plaintiffs are not entitled to the permanent injunction they seek because First Amendment violation

would not be proven by the necessary preponderance of evidence. My judgment would remain firm that the decisions of the school authorities were properly within their supervisory power to control the conduct of the students and did not violate First Amendment rights and privileges. The grant of the alternative relief is made in the interests of practicality.

The motion is granted to that extent only, otherwise denied.

It is so Ordered.

Dated: June 6, 1979
Albany, New York

/s/ JAMES T. FOLEY
United States District Judge

Editorial Page from HARD TIMES.

EDITORIAL: A Close-up on MASTURBATION

Call it what you will, jerkin' off, jackin' off, beatin' meat, cream stick whip, wangsnappin', or, beating around the bush, it's all the same. Everybody just wants to get their rocks off. If prostitution is the world's oldest pro-ression, Masturbation has to be the world's oldest hobby.

This art can, and is practiced in any of the following places; bedrooms, bathrooms, restrooms, lockerrooms, cars, buses, boats, trains, planes and any other place that offers a minimumal amount of privacy. (Even in class rooms if you are careful.) Some people may feel that snappin' your wang is perverted, others feel that it will make you impotent, and still others feel that it is a commie plot to undermine our capitalistic society. However, we aren't here to make any moral judgements, we're just trying to help people perfect a style to increase the pleasure from this ancient art.

A Few Helpful Hints:

1. Always use your stronger hand, in order to generate more J.P.M.'s (Jerks per Minute).
2. Warning! Painful chafing can occur if the proper lubricants aren't used—Vaseline & Crisco being the most popular.
3. Do not masturbate in front of parents, they won't understand.
4. If you have the money, there are hundreds of different electronic sex gadgets to help you hack off, although the plain old two hand shuffle can be just as satisfying.

Suspension Letter.

GRANVILLE CENTRAL SCHOOL

Granville, New York 12892

Office of the Principal

Granville Central Jr.-Sr. High School

February 1, 1979

Mrs. Marge Thomas
72 E. Quaker Street
Granville, New York 12832

Dear Mrs. Thomas:

Periodically over the past few months your daughter, Donna, along with three other Granville High School students, admittedly engaged, each to varying degrees, in a number of activities which culminated with the production of the newspaper *Hard Times*. Upon careful examination, a reasonable Granville person would have to conclude that this newspaper is characterized mainly by material that is morally offensive, indecent, and obscene. Activities in which the students engaged as part of the production included writing, correcting, typing, and storing the material. Because these production activities were carried out in part on school property and involved the use of school equipment, the students' conduct in such activity was judged by school authorities.

Hard Times was particularly inappropriate for production for, or distribution to, students of Granville Junior-Senior High School, a building which houses students in grades seven through twelve. No doubt this publication would shock the sense of decency held by the vast majority of parents and other citizens of our community.

Further, it is inconceivable that this newspaper could be judged to have any redeeming social value in this community.

As a result of several meetings this week among students, parents, board of education members, and staff at the Granville Junior-Senior High School, a decision was reached concerning penalties appropriate for the actions in which the students engaged. The decision was made by the school administration with the endorsement of the board of education. This morning, I informed the students of these penalties and I am now writing to inform you of the same. The penalties imposed are as follows:

1. Temporary suspension from school for a period of five days (beginning today and continuing through next Wednesday, February 7, 1979) with the option of reducing the period to three days (through next Monday, February 5, 1979) by submitting an essay acceptable to the District Principal, Mr. Don Miller, on the subject—"Potential Harm to People Caused by the Publication of Irresponsible and/or Obscene Writing." The acceptability of this essay will be judged on the basis of the quality of thought and reason as reflected by the content, the grammatical construction, and the appearance. Should the student have any question concerning what is required in this essay, Mr. Miller or I will be available for consultation. The essay should be submitted to either of us by 3 p.m. next Monday, February 5, 1979.
2. As with any suspension from school, Donna loses the rights and privileges of a student in good standing, for the duration of the suspension. She is not to be on school property and may not attend any school sponsored activity.

3. Study hall periods during the month of February will be spent in the general administrative offices of the school district or another assigned location.

If an acceptable essay has been submitted by February 5, 1979, penalties for involvement in the production of *Hard Times* will cease as of February 28, 1979. If an acceptable essay has not been submitted by February 5, 1979, and has still not been submitted by February 28, 1979, the period for spending study halls in the general administrative offices will be extended beyond February 28, 1979.

The decision regarding the above penalties was reached after considerable deliberation regarding their reasonableness, relevance, and fairness to all involved.

Aside from other negative aspects of the production of this newspaper, it is truly a shame that the students chose to concentrate their time and energy to the production of *Hard Times* and not toward some positive and constructive end. If students are going to choose to follow a particular course of action they must be willing to accept the consequences of that choice. In this particular instance, the students "have learned the hard way" of the consequences of their choice.

Sincerely,

WILLIAM E. BUTLER,
Principal

WEB/cm

cc: Don L. Miller,
District Principal

Fred J. Reed,
Asst. Principal

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Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1021

GRANVILLE CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION, WILLIAM E. BUTLER, DON L. MILLER, FREDERICK J. REED, BEVERLY TATKO, ROBERT L. FLOWER, TERRY M. KNIPES, WALTER PERRY III, FRANK P. VILLANO, DONALD BINCK, MARIE VANDERMINDEN, and THERESA MCCAULIFFE, each individually and in their official capacities,

Petitioners,

—against—

DONNA THOMAS, JOHN TIEDEMAN, by and through his parents Mr. & Mrs. Henry Tiedeman, DAVID JONES, by and through his parents Mr. & Mrs. John E. Jones, RICHARD WILLIAMS, by and through his parents Mr. & Mrs. Arthur F. Williams,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1021

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Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions are set forth in the appendices to the Petition.

Jurisdiction

Jurisdiction is as set forth in the Petition.

Questions Presented

1) Whether, high school administrators may punish students for distribution of a publication intended solely for off-campus consumption even though the school administrators concede that they do not desire to regulate student activities off campus.

2) Whether even if a student publication significantly involved on-campus activity, punishment for its publication was prohibited by the first amendment.

Statutes Involved

The Petition sets forth the relevant, and some irrelevant, statutes involved.

REASONS FOR DENYING THE WRIT

I.

Petitioners' Questions Presented Are Not Appropriate for Review by the Court.

Five of the six questions petitioners present are far from the mark of a cognizable issue for the Court.* The sixth--Question 2--is also not appropriate for

* Question 1, concerning whether a public school must make its facilities available for student publications, was never presented or decided in the court of appeals.
(fn. cont. on next page)

review, but deserves discussion in opposition to the granting of a petition for certiorari.

(fn. cont. from preceding page)
Question 2 will be discussed in the text, above.

Question 3--whether actual disruption of educational process need be proved to justify punishment for First Amendment activities --was also not decided by the court of appeals.

Similarly Question 4--whether a prior restraint requires an independent adjudication--was not an issue in the case, for the Court of Appeals characterized the effect on the students as punishment for, not censorship of, First Amendment activities only. Prior restraint was not an issue reached.

Question 5--whether the defendant school administrators were bound by the statement of reasons for punishment in the suspension letter to the students' parents--also misses the point made by the court of appeals. As an evidentiary matter, relying on New York Times v. Sullivan, 376 U.S. 254, 285 (1964), the court of appeals found that the punishment of the students was for distribution of the lampoon and not some other offense. Review in this Court should not be premised on a review of the court of appeals' power to reach that conclusion, especially, when as here, the facts on which the conclusion was based are not disputed by either side. Only the characterization of those facts as First Amendment activity is in question.

And Question 6, actually two questions--is it error to characterize facts differently than the district court and did the court of
(fn. cont. on next page)

The proper way to frame Question 2 is as follows (see also Questions Presented, this brief): whether high school administrators may punish students for distributing a publication intended solely for off-campus consumption even though the school administrators concede that they do not desire to regulate students activities off campus. For as narrowly framed by the court of appeals, the decision here simply involves a

(fn. cont. from preceding page)
appeals fail to decide the issue presented to it--is duplicative of Questions 5 and 2 respectively. Though it is true that the court of appeals' characterized certain facts differently than the district court, the facts themselves were never in dispute. For example, storage of the lampoon in a closet and editing stories after school in a classroom were characterized by the Court of Appeals as "de minimus" school activities and, by the district court as insubordinate school activities. The fact of storage and after-school editing were never disputed. Thus, this part of Question 6 is inappropriate for review for the same reason that Question 5 should not be reviewed.

The second part of Question 6--did the court of appeals fail to reach the issue presented to it--duplicates Question 2--can a school punish students for first amendment activities directed at outside school activities.

mistake by the defendants: they punished students for off-campus activities they mistakenly believed involved significant on-campus activities. But with good reason the court of appeals disagreed, calling all connections with the school "de minimus." For in this case there is no contention that the students did more than store and edit a small portion of the material in one teacher's room after school hours. Copies of the magazine were not distributed in school and no public property or resources were used for production or distribution. And, the cover of the one issue published specifically any school connections.

The narrow resolution which disposed of the case below was simply a decision that a school which mistakenly punished students for on-campus first amendment activity may not do so when in fact the activity was, in essence, off-campus. Thus, the question presented here is primarily evidentiary and could only be accepted for review if the Court decided that the paltry connections with the high school campus gave the school a right to punish the students, or if the Court concluded that due process permitted a school to punish its students for off-campus first amendment activities the school itself had conceded were outside its jurisdiction.

Furthermore, even if the Court found either of these questions worthy of review, the case should not be taken unless the larger question not reached below (see Questions Presented above) could also be resolved; namely, whether, even if preparation and distribution of this lampoon did constitute on-campus activity, its publishers were not protected from punishment for their expression by the first amendment.

II.

Even if the Student-Respondents' Publishing Activities may be Characterized as On-Campus, they were Protected by the First Amendment.

The students distributed their lampoon--"Hard Times"--without incident. The petitioner school administrators received a copy of "Hard Times" on the first day of distribution. And, the publication circulated for six days without comment or disruption before petitioners ever investigated its origin; the ultimate investigation resulted solely from a complaint by the chairperson of the Board of Education who decided to take matters into her own hands.

The circuit courts of appeal have uniformly protected students who published both on and off campus. Student publication rights have without exception been protected even when the matter distributed was indecent, albeit non-obscene. Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd without opinion, 515 F. 2d 504 (2nd Cir. 1975); Eisner v. Stamford Board of Education, 440 F. 2d 803 (2nd Cir. 1971); Trachtman v. Anker, 563 F. 2d 512 (2nd Cir. 1977), cert den., 435 U.S. 925 (1978); Jacobs v. School Commissioners, 490 F. 2d 601 (7th Cir. 1973); vacated as moot, 420 U.S. 128 (1975); Fujishima v. Board of Education, 460 F. 2d 135 (7th Cir. 1972); Scoville v. Board of Education, 425 F. 2d 10 (7th Cir. 1970); Shanley v. Northeast Independent School Dist., 462 F. 2d 960 (5th Cir. 1972); Quarterman v. Byrd, 453 F. 2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir. 1973); Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975);

Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd, 564 F. 2d 157 (4th Cir. 1977); Riseman v. School Committee of the City of Quincy, 439 F. 2d 148 (1st Cir. 1971).

Therefore, clearly non-disruptive literature such as "Hard Times," not predicted to be disruptive by any school administrator at Granville High School, cannot provide a basis for punishment of students by school authorities. In order to grant review in this case the Court would have to be prepared to say otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be denied review.

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